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92-648

Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES
SEPTEMBER TERM, 1992

EDWIN KOTROSITS, ET AL.,

Petitioners

vs.

GATX CORPORATION NON-CONTRIBUTORY
PENSION PLAN FOR SALARIED EMPLOYEES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Third Circuit Court of Appeals' decision reversing the decision of the District Court and denying Petitioner class members certain retirement and welfare benefits represented an inappropriate disregard of the District Court's discretionary findings of fact that the Plan fiduciaries acted in bad faith and under a conflict of interest when they denied Petitioners' claims for benefits, thereby effectively circumventing the arbitrary and capricious test developed by the Eleventh Circuit Court of Appeals in Brown v. Alabama Blue Cross/Blue Shield, Inc., 889 F.2d 1556 (11th Cir. 1991), cert. den. 484 U.S. 1012, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991), and substantially impairing employees' rights to recover pension and welfare benefits under ERISA?

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that:

1. The panel of judges below at the Third Circuit Court of Appeals are The Honorable Walter K. Stapleton, The Honorable Anthony J. Scirica, and The Honorable Jane R. Roth.

2. Plaintiffs below, Petitioners in this Court, are Edwin Kotrosits, Julius Ruggeri and Marvyn Souders, on their own behalf, and on behalf of all others similarly situated.

3. Counsel for Plaintiffs below, Petitioners in this Court, is Seymour Traub, Esq., of Traub, Butz & Fogerty, P.C.

4. Defendant below, Respondent in this Court, is GATX Corporation Non-Contributory Pension Plan for Salaried Employees.

5. Counsel for Defendant below, Respondent in this Court, is Herbert L. Zarov and Kenneth E. Wile, of Mayer, Brown & Platt.

Respectfully submitted,

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CITES TO THE DISTRICT COURT AND COURT OF APPEALS

The opinion of the District Court is found at 757 F. Supp. 1434 (E.D.Pa. 1991).

The opinion of the Court of Appeals is found at 1992 U.S. App. LEXIS 1510, 15 E.B.C. 1729 (1992).

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The final judgment by the District Court was entered on February 25, 1991. On April 15, 1991, an Order was entered in the District Court denying the Plan's Motion for a New Trial, or in the alternative, to Amend the Judgment. The opinion of the Court of Appeals reversing the District Court decision was filed on July 6, 1992.

Petitioners are authorized to seek review of this matter by Rule 17, Rules of the United States Supreme Court and 28 U.S.C. Section 2101.

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act, 29 U.S.C. §1001 *et. seq*.

STATEMENT OF THE CASE AND THE FACTS

Plaintiffs are former longtime employees of Fuller Company. Fuller was a direct subsidiary of GATX Corporation from 1954 to 1975, at which point it became a wholly-owned subsidiary of General American Transportation Company ("GATC"), a subsidiary of GATX. It remained so up until December 31, 1986, when GATX and GATC severed their relationships with Fuller by selling all its stock to an entity known as F. A. Holding Company.

As a result of their Fuller employment, Plaintiffs were participants in the GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES ("the Plan"). The Plan document provided for payment of a particular form of retirement benefits, i.e., "the 75/80 benefits," to any employee (a) whose age and years of service added up to 80, or who was at least 55 years of age, and his age and years of service added up to 75; and (b) who

experienced a termination of employment due to layoff, permanent plant shutdown or disability. The Plan contained no definition or explanation of the term, "layoff."

The Plan is a non-contributory defined benefit plan. That is, the employer makes all of the contributions, and the monthly amount received by each pensioner is determined based upon a formula taking into consideration the employee's salary during a certain period of employment with a participating company.

Under the Plan, a participating subsidiary such as Fuller was responsible for making contributions associated with its employees. However, after its December 31, 1986 sale of Fuller, GATX was solely responsible for any contributions needed after that date to fund payment of retirement benefits to any former Fuller participants in the Plan.

The GATX/GATC sale of the Fuller stock on December 31, 1986, took place pursuant to a Stock Purchase Agreement executed by the pertinent parties (i.e., GATX, GATC and F.A. Holding Co.), on October 12, 1986. This Agreement contained a specific provision providing that the sale constituted a "termination of employment" of all Fuller employees. Furthermore, there was no language whatsoever in the Agreement obligating F.A. Holding to continue operating Fuller or to retain or rehire any of the people who had worked for Fuller prior to the December 31, 1986 closing. The Stock Purchase Agreement differed from an earlier draft which had called for Fuller-related assets and liabilities under the Plan to be transferred to F.A. Holding; indeed, there was no language even obligating F.A. Holding or the new Fuller Company to adopt their own pension plan. The Agreement also obligated GATX to indemnify

F.A. Holding against "any and all claims, liabilities, losses, damages, costs and expenses relating to or arising directly or indirectly out of a claim that [the Plan] required providing subsidized early retirement benefits [i.e., 75/80 benefits] . . . ."

At the time of the Fuller sale, the three representative Plaintiffs each qualified, from an age and years of service standpoint, for 75/80 benefits. Each requested those benefits before December 31, 1986 but was rejected.

When the Stock Purchase Agreement was signed on October 12, 1986, the Plan Administrator, James Herbert (who also happened to be Director of Employee Benefits at GATX), had not yet decided whether to permit Fuller employees who were being terminated pursuant to that Agreement to pursue 75/80 retirements. He did, however, request GATX' actuaries to determine the increased pension cost which would result if

Fuller employees elected the 75/80 option. The actuaries advised that it would cost at least an additional $2 Million.

On November 19, 1986, Mr. Herbert travelled to Fuller's offices in Bethlehem, PA, and made two significant announcements:

(a) he would not allow any Fuller employees to elect the 75/80 point retirement option, and

(b) that any Fuller employee who did not retire before December 31, 1986, would lose certain welfare benefits (i.e., lifetime medical and life insurance benefits), which up to then had been available to all retiring Plan participants.[1]

As the District Court correctly noted, the timing of Mr. Herbert's decision to deny

[1]No threats were made nor was any action taken to deprive any Plan participants other than Fuller employees of these welfare benefits.

75/80 benefits (i.e., after receiving notification of the significant amount those benefits would cost the Plan) is significant because the Stock Purchase Agreement had already been signed at that point and GATX knew it would have suffered a significant loss in the net proceeds in that transaction since it could not pass those additional pension costs on to the purchaser, F. A. Holding. Of equal if not greater significance is that by denying Plaintiffs' claim for 75/80 point benefits, GATX was further able to avoid the expense of the lifetime medical and life insurance benefits which would have been payable to the Souders' subclass if its members had been allowed to elect 75/80 retirement before December 31, 1986. As with the added pension costs, GATX could not pass these on to F. A. Holding since they had already signed, sealed and delivered the Stock Purchase Agreement, and that document (in

Section 5.10(i)) obligated F. A. Holding to reimburse GATX only a fixed sum, i.e., $600,000.00, of the annual costs incurred by GATX in providing post-sale health and welfare benefits "to former employees of Fuller who have retired prior to the closing date . . . ."

Edwin Kotrosits and Julius Ruggeri represent a subclass of employees who were 55 years of age or older as of the December 31, 1986, closing. Based on their age and years of service, the members of this subclass qualified to elect (which they did when their 75/80 requests were rejected) an actuarially-reduced 55/15 early retirement. They did so however, only because they were threatened and scared that if they did not they would lose the lifetime welfare. Marvyn Souders represents a subclass of Fuller employees/participants who had not yet reached 55 years of age as of the closing date.

None of the Plaintiffs knew whether they would have jobs with the new company when they left work on December 31, 1986. They were told they would learn after the sale. On January 2, 1987, both Messrs. Kotrosits and Ruggeri received calls inviting them to work with the new Fuller Company. Mr. Souders was told on January 5, 1986 to report on January 6, 1986 to the Fuller facility where he had worked previously.

After the December 31, 1986 closing, the representative Plaintiffs pursued claims under the Plan's administrative process. The Plan Administrator, James Herbert (Director of Employee Benefits at GATX) denied those claims. Plaintiffs appealed to the three-person Benefits Committee, James Glasser, President and Chief Executive Officer of GATX; Paul Heinen, Vice President and General Counsel of GATX; and Roland Finkelman (also Mr. Herbert's boss), Vice President of Human

Resources at GATX. The Benefits Committee denied the appeals on the grounds that the employees did not suffer a "layoff" under Section 4.5(a) of the Plan.

These "fiduciaries" attempted to rest these not-unexpected denials on the supposed similarity and applicability of prior GATX transactions involving (1) Marine Transport Lines, Inc., (2) GARD Division, (3) Richmond Terminal, (4) Pollock, and (5) GATC (Sharon, PA). However, these were readily distinguishable (in ways they were not told or knew and chose to disregard) from the Fuller sale.

In 1983, GATX spun off the shares of a wholly-owned subsidiary, Marine Transport Lines, Inc ("MTL"), as a special dividend to GATX shareholders. This transaction differed from the Fuller sale in that GATX received no consideration in return for the spun-off MTL shares. Furthermore, MTL management (not the

Plan fiduciaries), gave five employees the option of electing a layoff prior to the spin off so they could obtain a 75/80 retirement.

On April 12, 1984, GATX sold the property and assets of its GARD, Inc., division/subsidiary to Chamberlain Manufacturing Corporation. Chamberlain assumed all liabilities for pension benefits arising under the plan relative to GARD employees. In addition, the Asset Purchase Agreement obligated Chamberlain to establish a separate pension plan to cover GARD employees, which had to be substantially similar to Chamberlain's existing plan. F. A. Holding was not obligated here to provide a Plan for the new Fuller employees.

In September, 1984, GATX Tank Storage Terminals Corporation sold its Richmond Terminal to Unitank Terminal Service. The language in the Agreement of Sale specifically provided that (a) the Richmond Terminal

employees "shall" become employees of the buyer, and (b) the asset/sale transaction was not to be considered a termination of employment for the salaried employees of the Richmond Terminal.[2]

TEC was a wholly-owned subsidiary of GATC and a second tier subsidiary of GATX. In June, 1984, GATX sold TEC's assets to Brown Minneapolis Tank and Fabricating Company. Notwithstanding its knowledge that Brown Minneapolis was considering hiring some TEC employees, the Plan granted 75/80 pensions to all 11 TEC employees who qualified in terms of age and years of service. Two of TEC's employees, Messrs. Deason and Miller, received 75/80 layoff pensions as well as jobs with Brown Minneapolis.

Following the rejection by the Benefits Committee, Petitioners filed this action in

[2]As noted before, the Agreement here provided the opposite.

the United States District Court for the Eastern District of Pennsylvania. After extensive discovery and the filing of numerous Briefs and Stipulations of Fact with the Court, the Honorable Edward N. Cahn issued a seventy-eight (78) page Opinion in support of an Order wherein he held that (a) members of both subclasses were entitled to 75/80 benefits, and (b) members of the SOUDERS subclass were also entitled to the lifetime medical and life insurance welfare benefits they would have received had they been properly permitted to elect 75/80 retirement on or before December 31, 1986. In his detailed and well-reasoned Opinion, Judge Cahn made factual findings that (a) the Plan fiduciaries had been operating under a conflict of interest, (b) Petitioners had indeed suffered a "layoff" because of their temporary suspension of work at the time of the December 31, 1986 closing, and that the

Plan had acted in bad faith in first refusing to disclose to the Petitioners how their pension benefits were to be handled in conjunction with the sale and in later using the threat of the loss of the lifetime welfare benefits to intimidate and coerce the Plaintiffs into submitting forms electing an actuarially-reduced 55/15 retirement. Under the test established by the Eleventh Circuit Court of Appeals in Brown v. Blue Cross/Blue Shield of Alabama, Inc., 898 F.2d 1556, 1566-67 (11th Cir. 1990), Judge Cahn determined that the Plan fiduciaries abused their discretion in denying Plaintiffs' claims for 75/80 benefits.

The Plan appealed Judge Cahn's decision. In reversing, the Third Circuit Court of Appeals essentially disregarded all of Judge Cahn's factual findings, made its own factual findings that there was no bad faith or a conflict of interest, and applied a fully

deferential standard of review which doomed all of Plaintiffs' claims.

BASIS FOR FEDERAL JURISDICTION

This suit invoked federal jurisdiction pursuant to the Employee Retirement Income Security Act, 29 U.S.C. §1001, et seq.

ARGUMENT

The issue before this Court is of considerable significance in the arena where employers and employees wage battle over pension rights. It also goes to the heart of a District Court's fact-finding responsibilities and an appellate court's ability to disregard those findings to change the outcome of a case to its own liking.

In 1989, this Court issued its decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 115, 109 S. Ct. 948, 103 L.Ed. 2d 80 (1989), essentially holding that trial courts were to apply a de novo standard of review in evaluating decisions of ERISA plan fiduciaries, unless the plan provided for a more deferential standard. The obvious effect of that decision was that every employer which did not already incorporate a highly deferential standard in its plans to immediately cause them to be amended to take

advantage of that more relaxed standard of review. The net effect for employees has been that virtually all claims for ERISA benefits are now governed by an arbitrary and capricious standard. However, application of this standard, particularly where a conflict of interest (i.e., a factual finding) is unnecessarily and improperly disturbed by an appellate court, will clearly result in employees having less rights under ERISA than they would have had prior to the enactment of ERISA. In pre-ERISA cases where contract law principles applied, an employee could at least count on being able to argue that questionable plan provisions should be interpreted against the drafter, i.e., the employer. Now, however, this is not so, even where (as here) the Plan does not condition receipt of benefits on an event (i.e., "permanent" unemployment) on which the fiduciaries claim to have based their decision.

In the case before this Court, the Third Circuit Court of Appeals has truly compounded the workers' dilemma. The District Court engaged in a detailed and studied consideration of all the evidence and determined that the Plan fiduciaries had been acting in bad faith, under a conflict of interest and in an arbitrary and capricious manner in finding (as a factual matter) there had been a "temporary suspension" of employment (i.e., a layoff). The Court of Appeals disregarded all of that effort and concluded that a layoff or cessation of employment had not occurred, despite the fact that (a) the Stock Purchase Agreement between GATX and F. A. Holding specifically provided that the sale was a "termination of employment" for purposes of the Plan for all Fuller participants, (b) Petitioners had been sent letters by the Plan Administrator after the sale confirming there had been a

"termination" of their employment for Plan purposes, and (c) the lower courts factual determination that the Plaintiffs left work on the last day of their employment without jobs, and that they would not know until after the first of the year whether or not they would have jobs at the new Fuller Company. In reaching its decision, the District Court properly applied and relied upon the Eleventh Circuit's decision in Brown v. Blue Cross/Blue Shield of Alabama, Inc., supra. As a result, the Third Circuit's rejection of the District Court's rationale creates a likelihood of confusion among lower and appellate courts as to precisely what the arbitrary and capricious and/or abuse of discretion standard involves, and to what extent factual determinations of a District Court should be disregarded by a Court of Appeals.

To start with, there was a "layoff," there can be no doubt the Petitioners were

terminated, even though it may have been briefly, since (1) the Plan sponsor characterized the Fuller sale as a termination of employment in the Stock Purchase Agreement; and (2) GATX, the Plan sponsor, sent letters in March, 1987 to a member of Fuller participants confirming that "[their] services with GATX terminated on December 31, 1986." The underlying issue is whether this termination resulted from a "layoff" under the Plan document.

Respondent continuously argued that the term "layoff" has a meaning other than its common usage, i.e., temporary suspension of employment, and necessarily entails a long-term or permanent period of employment. However, the Plan does not state this, indeed, it contains no definition of "layoff." Respondent also contends that Petitioners did not suffer a layoff (hence, no termination of employment) because they were offered

positions with the new Fuller Company and suffered no break in their employment relationship. However, the District Court properly found (which the appellate court paid no heed) that since the Plan document did not make 75/80 point benefits contingent upon any specific period of unemployment, the fact that their jobs were temporarily suspended (terminated according to GATX) the Plan fiduciaries had read into the Plan a condition which did not exist. This, of course, is the essence of arbitrary and capricious conduct.

The Third Circuit, however, disagreed with the District Court's factual interpretation (and, essentially that of other courts which have been forced to define the term "layoff" where no other meaning is ascribed under the plan document) of a layoff.[3] Indeed, the Third Circuit agreed

[3]See CBS Inc. v. International Photographers of the Motion Picture Industries, Local 644, 603 F.2d 1061 (2d Cir.

with Respondent that the "most common" understanding of a layoff is where an employee suffers a loss of work time and direct compensation, yet there is neither evidence of this meaning under the Plan nor any other supporting authority offered on this issue. In short, the Third Circuit has held that it is not arbitrary and capricious for plan fiduciaries to "rewrite" a plan by imposing non-existent conditions. However, had GATX intended a requisite length of time to pass for a layoff to exist, they could have very easily done so in the Plan document. The fact that they didn't, yet later attempted to

1979) (A layoff consists of a period of temporary dismissal -- inherent in the term is the anticipation of recall); and International Alliance of Theatrical Stage Employees v. Gulf Int'l. Cinema Corp., 568 F.Supp. 1396 (E.D. La. 1983) (Layoff is no more than a suspension of work of an individual employee).

impose that requirement, is the essence of arbitrariness.[4]

The Plan fiduciaries were allowed by the Third Circuit to interpret the Plan document in any way they saw fit under the circumstances; regardless of the level of their conflict of interest.

On the conflict of interest issue, the Eleventh Circuit's decision in Brown is pivotal. In applying this Court's holding in Firestone Tire and Rubber Company v. Bruch, 489 U.S. 115, 109 S.Ct. 948, 103 L.Ed.2d 80

[4]Other employers have had no trouble more clearly defining the meaning of a layoff and/or the various possible types of terminations warranty certain enhanced levels of benefits. See Taylor v. The Continental Group, 933 F.2d 1227 (3d Cir. 1991) (Severance benefits due on "involuntary termination", defined as "any ... termination .... within two years after a change in control ...."); and Harper v. R.H. Macy & Co., 928 F.2d 544 (8th Cir. 1990) (Severance benefits available when employee is "permanently terminated or laid off for periods that exceed ninety days").

(1989), the Eleventh Circuit held in Brown as follows:

> A wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries."

Brown v. Blue Cross/Blue Shield of Alabama, Inc., 898 F.2d 1556, 1566-67 (11th Cir. 1990). The Brown court correctly followed the Restatement (Second) of Trusts §187, Comment d (1959) which provides six factors in determining whether there is an abuse of discretion: (1)the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power; (4) the existence or non-existence), the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's

conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; and (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.

In the case subjudice, the District Court followed Brown and found the Plan fiduciaries to have had "an interest" conflicting with that of the beneficiaries, i.e., a conflict of interest, when they denied Petitioners' claims for benefits. The Third Circuit simply refused to recognize this obvious conflict; perhaps that was the only way they could avoid directly test challenging Brown.

One undeniable indicator of the conflict found by the District Court was that the three-person benefits committee consisted entirely of high-ranking GATX officers who held the highest positions within the company. There was not a single voice on that Committee which would be inclined to speak up for the

workers whose lives were being affected by pension decisions such as this one. Moreover, since GATX sponsored the Plan, the District Court correctly found there was a monetary conflict.

> Because GATX had just sold Fuller, it had no incentive to consider the effect of the benefits decision on the morale and productivity of Fuller employees. Moreover, the fact that the denial affected a large number of employees and resulted in an estimated savings of $2 million for the Plan undermines the rationale for deferential review. The larger the expenditure, the greater the possibility that the sponsor will eventually have to replenish the Plan's funds."

Kotrosits v. GATX Corporation Non-Contributory Pension Plan for Salaried Employees, 757 F. Supp. 1434, 1156 (E.D. Pa. 1991). See also, Van Boxel v. Journal Co. Employees Pension Trust, 836 F.2d 1048 (7th Cir. 1987).

A trustee is required to "exclude all selfish interest and all consideration of the interest of third person" in making fiduciary decision. G. Bogert & G. Bogert, The Law of

Trust and Trustees, Section 543 at 197-98(2d) Rev. R. Ad. 1978). Here, GATX as Plan sponsor was unquestionably obligated to make all future contributions to this Plan which might result from any actuarial shortfalls. The Third Circuit, inexplicably felt this to be of no significance, even though the savings resulting to the Plan would be in excess of at least $2,000,000.00, because the Plan was "fully funded." This conclusion, however, overrode yet another factual finding of the District Court that such a significant considerable outlay would unquestionably have an effect on the company which is required to fund the Plan in the future, irrespective of the current financial condition of the Plan. Quite frankly, it is hard to fathom how avoiding such a major outlay of funds could not be deemed in GATX's interest (i.e., contrary to Plan beneficiaries' interests) when GATX is the company required to make all

future contributions to the Plan, the amount of those contributions will obviously be affected by such a major outlay, regardless of whether or not at any given point in time the Plan happens to have more or less assets than its accrued liabilities.[5]

Perhaps more importantly, the Third Circuit improperly and unfairly brushed aside

[5]There were differences of interpretation concerning actuaries' reports submitted concerning Plan assets and liabilities. Respondent contends it was "fully funded," claiming it had an $8.79 Million "surplus" as of January, 1986 and a $10.2 Million claiming "surplus" as of January 1, 987. However, the "accrued benefit" figure on which these numbers are based includes only benefits earned as of the valuation date; it does not anticipate future service or future salary increases which will undoubtedly occur (" . . . the accrued benefit values are very different from the ongoing (i.e., future) funding requirements which do include assumptions about future benefits to be earned") (emphasis supplied). In other words, it indicates "full funding" if the Plan would have been terminated (which obviously did not happen) on those dates. However, and more significantly, there is nothing on the record indicating that the Benefits Committee was aware of this supposed current (as opposed to future) funding "surplus" when it denied Plaintiffs' claims for benefits.

an even more direct and compelling indication of the fiduciaries' conflict of interest, i.e., that by denying Petitioners' 75/80 claims, GATX avoided its direct out-of-pocket liability for the lifetime medical and life insurance benefits for the Souders class. These are precisely the type of unfunded welfare benefits which courts have repeatedly and consistently found trigger a conflict of interest. Moreover, there was nothing preventing the Third Circuit from taking judicial notice of the high cost of retirees' medical costs. See Fed.R.Evid. 201(f). See Mainline Investment Corp. v. Gaines, 407 F. Supp. 423 (N.D. Tex. 1976) (judicial notice taken of rising oil prices). Fox v. Kane-Miller Corp., 398 F. Supp. 609 (D. Md. 1975), aff'd., 542 F.2d 915 (4th Cir. 1975). See also BNA Pension Reporter, Volume 17, No. 38, p. 1591 (September 17, 1990) (discussing costs of retiree medical benefits. However, the

Third Circuit ignored this authority and blithely shrugged off the significance of these welfare benefits as they related to the conflict of interest issue.

It is submitted that the Third Circuit felt compelled to override the District Court's factual finding that there has conflict of interest because of its critical significance under the Eleventh Circuit's decision in Brown v. Blue Cross/Blue Shield of Alabama. It is further submitted that the effect of the Third Circuit's action is to do an end run on Brown, thereby establishing precedent for other courts to avoid the sound rationale and holding of Brown, particularly given the imminent demise of the de novo standard of review as previously discussed. The logic and holding of the Brown decision is so important it bears discussion.

In that case, the defendant/ insurer/administrator had denied plaintiff's

claim for hospitalization benefits under a group health plan. The denial was based on the plaintiff's supposed failure to obtain pre-certification for the hospital admission.

The District Court for the defendant, holding that the denial of benefits denial was not arbitrary and capricious.[6] In reversing, the Eleventh Circuit first noted that under Firestone, courts should consider common law principles applicable to trusts in evaluating whether there has been an abuse of discretion.[7] The court then dutifully

[6]Interestingly, the effect of the Third Circuit's decision in this case is the same as holding that the District Court should have entered summary judgment in favor of the Plan and against the within Petitioners. That is, the Third Circuit essentially held that taking all facts as true before the District Court (even though the Third Circuit redefined those facts on its own), Petitioners could not prevail as a matter of law.

[7]In Firestone, this Court when speaking the application of the abuse of discretion standard, noted that the fiduciary's conflict of interest should be weighed as "a factor" in determining whether there has been an abuse of discretion. Firestone Tire & Rubber Co., 489

followed this Honorable Supreme Court's direction in Firestone, citing and discussing the six factors enumerated in Section 187 of the Restatement (Second) of Trusts. (Id. at 1564-65). After an exhaustive review of those criteria, plus the history of and rationale behind the abuse of discretion standard, the court established the following rule:

> When a plan fiduciary demonstrates a substantial conflict of interest on the part of the fiduciary responsible for benefits determinations, the burden shifts to the fiduciary to prove that its interpretation of plan provisions committed to its discretion was not tainted by self-interest. That is, a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected beneficiary or beneficiaries unless the

U.S. at 115, 109 S.Ct. at 956, 103 L.Ed. 2d at 95.

> fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries. Id. at 1566-67.

The Brown court shifted the burden to the fiduciaries to justify their actions because people having a conflict of interest

> . . . inherently implicate the hobgoblin of self-interest. Adverse benefits determinations save considerable sums that are returned to the fiduciaries' corporate coffers. The presumption that the fiduciaries acted for the future stability of the fund cannot be entertained. Id. at 1568.[8]

The court further noted that,

> [t]he area of discretion to which deference is paid must be confined narrowly to decisions for which a

[8]The Brown court also went on to hold that if the fiduciary sufficiently justifies his conduct, the burden then shifts back to the plaintiff to demonstrate that conduct is "arbitrary and capricious by other measures" (Id. at 1568).

> conflicted beneficiary can demonstrate that it is operating exclusively in the interests of the plan participants and beneficiaries . . . . The fiduciary, however, should bear the burden of dispelling the notion that its conflict of interest has tainted its judgment. Id.

Since Brown was decided, it has been approvingly cited by two other panels of the 11th Circuit. See Anderson v. Blue Cross/Blue Shield of Alabama, 907 F.2d 1072 (11th Cir. 1990) and Newell v. Prudential Insurance Company of America, 904 F.2d 644 (11th Cir. 1990). It has also been followed in Poole v. Seattle-First National Bank, 741 F. Supp. at 846 ("find[ing] the reasoning in Brown to be persuasive"); and Cargile v. Confederation Life Insurance Group Plans, 748 F. Supp. 874 (N.D. Ga. 1990).[9] Other courts have taken

[9]In Cargile, the defendants' effort to justify their decision on the basis of its benefit to other participants, consisted of a single self-serving sentence in defendant's

notice of the general principles of Brown, even though not having to apply its specific holding of to their facts. Bass v. The Prudential Insurance Company of America, 1991 U.S. Dist. LEXIS 7720 (D. Kan. May 29, 1991); In re: Gulf Pension Litigation, No. 86-4365, 1991 U.S. Dist. LEXIS 4631 (S.D. Texas, April 10, 1991). Miller v. Metropolitan Life Insurance Co., 925 F.2d 979 (6th Cir. 1991); Daniels v. Anchor Hocking Corp., 758 F. Supp. 326, 355 (W.D. Pa. 1991). Moreover, Petitioners have been unable to locate a single decision challenging or criticizing the abuse of discretion test established in Brown.

Brief that the fiduciary had sought to conserve the plan assets. (Id. at 880). The court ruled that this "naked assertion" cannot "purge the taint of self-interest." Id. Ironically, in this case, Respondent made a last-minute desperate effort to place evidence before the District Court that the Plan Administrator was acting in the best interest of all participants. This consisted of a conclusory and virtually meaningless Affidavit submitted by the Plan Administrator, Mr. Herbert, which the District Court correctly gave little credence.

Here, the District Court found as a factual matter that the Plan had failed to sustain its burden of proving that denial of Plaintiffs' 75/80 claims benefitted other participants or beneficiaries (757 F. Supp. at 1461). Under Brown, this absolutely mandates a conclusion that the Plan fiduciaries abused their discretion in denying Plaintiffs' claims for benefits. Critically however, the Third Circuit's refusal to get to this issue by overruling the District Court's finding of a "conflict" completely undermines Brown and sends conflicting and confusing signals to trial and appellate courts. In particular, can an appellate court wishing to avoid the effects of Brown do so by simply reversing the District Court's factual finding that there was a conflict of interest? Or shouldn't the appropriate level of deference be accorded the lower court's factual findings, with an appellate court then being bound to follow the

test laid down in Brown, i.e., once a conflict exists, then has the fiduciary met its burden of proving it acted in the best interest of all Plan participants and if he hasn't, then he has abused his discretion.

Lastly, the Third Circuit's decision has implications concerning the application of the arbitrary and capricious standard above and beyond its side-stepping of Brown. Here, the Third Circuit advocates that unless there is a "direct" conflict (not "a conflict" as discussed in Brown and in Restatement of Trust, Section 167), a plan fiduciary's decision should be afforded full deference irrespective of the fact that the fiduciaries (as here) consist of a stacked deck of individuals who are obviously pro-employer and anti-employee.

There was certainly a divergence of opinion, even prior to this Court's decision in Firestone, as to what constituted an abuse

of discretion or arbitrary and capricious conduct by plan fiduciaries.

The Fifth Circuit followed a three part test to evaluate a plan administrator's good faith: (1) uniformity of construction; (2) "fair reading" and reasonableness of that reading; and (3) unanticipated costs. Dennard v. Richards Group, Inc., 681 F.2d 306, 314 (5th Cir. 1982). The Eighth Circuit defined the arbitrary and capricious standard as requiring a determination of whether the fiduciary's decision was supported by substantial evidence, was contrary to law or was made in bad faith. See Niagara Paper Corp. v. Paper Industrial Union Management Pension Fund, 800 F.2d 742, 745-46 (8th Cir. 1986); Short v. Central States Southeast and South West Areas Pension Fund, 729 F.2d 567, 571 (8th Cir. 1984). The Seventh Circuit required proof that the fiduciary's decision was arbitrary, fraudulent or in bad faith.

Sly v. P.R. Mallory & Co., 712 F.2d 1209 (7th Cir. 1983). The pre-Firestone and pre-Brown test in the Eleventh Circuit was "whether [the trustees] interpretation was made rationally and in good faith - not whether it was right." Anderson v. Ciba-Geigy Corp., 759 F.2d at, 1522. In a post-Firestone case, but pre-dating Brown, the 11th Circuit cited the three part test referenced in Dennard, supra. See Guy v. Southeastern Iron Workers Welfare Fund, 877 F.2d 37 (11th Cir. 1989).

It is submitted that, having given the Firestone decision a chance to be digested and applied by the District and Circuit Courts, there is confusion as to (a) a District Court's fact-finding responsibilities, and particularly as to how far an appellate court should transgress in overturning well substantiating findings such as were made in this case by the District Court, and (2) how precisely the arbitrary and capricious

standard is to be applied, particularly the extent which a conflict of interest plays, and to what level (i.e., direct, indirect, intermediate, etc.) that conflict must rise to trigger the test enunciated by the Eleventh Circuit in Brown. However, regardless of the test formulated, it is submitted that the Third Circuit here did precisely what it admonished the District Court not to do, i.e., it ignored the District Court's well-supported factual findings of bad faith, conflict of interest and interpretation of plain Plan language. By contrast, it is inconceivable, as a matter of law, that an injustice has not occurred here, and that the obviously conflicted fiduciaries (all major officers of GATX) did not abuse their discretion, in applying an interpretive gloss to the word "layoff" which did not exist in the Plan, when (a) they did not have any information before them concerning the funded status of the Plan,

(b) the fiduciaries put nothing meaningful on the record before the lower court from which anyone could reasonably conclude they were acting in the interest of anyone other than an impermissible party i.e., GATX, (c) they attempted to claim there was no "termination" of employment, despite the fact that the Stock Purchase Agreement and a post-closing letter sent by Plan representatives clearly indicated that there had been such a termination, (d) they sought to base their decision on the existence of a pension plan for the new Fuller Company which had not yet been adopted and which Fuller had no duty to adopt, and (e) they sought to "rely" on the prior transactions (i.e., MTL, TEC, etc.) was completely misguided because the scanned information which they had received from the Plan Administrator was very misleading as to the nature of those transactions and indeed on closer scrutiny, those transactions undercut

the decision made by the fiduciaries in this case.

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Respectfully submitted,

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EDITOR'S NOTE

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92-648

Supreme Court, U.S.
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Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES
SEPTEMBER TERM, 1992

EDWIN KOTROSITS, ET AL.,

Petitioners

vs.

GATX CORPORATION NON-CONTRIBUTORY
PENSION PLAN FOR SALARIED EMPLOYEES,

Respondent

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

APPENDIX

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Filed July 6, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1410

EDWIN KOTROSITS; JULIUS RUGGERI; MARVYN SOUDERS, on their own behalf and on behalf of all others similarly situated: REUBEN ALDRICH; ALEXANDER CHRISTIE; WALTER C. GOTHE; PAUL W. NIELSEN; RUSSELL E. SCHEIRER

v.

GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES,

Appellant

On Appeal From the United States District Court
For the Eastern District of Pennsylvania
(D.C. Civil Action No. 88-01835)

Argued October 16, 1991

BEFORE: STAPLETON, SCIRICA, and ROTH, Circuit Judges

(Opinion Filed July 6, 1992)

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OPINION OF THE COURT

STAPLETON, Circuit Judge

I.

At the end of 1986, the GATX Corporation and its subsidiary, General American Transportation Company (GATC), sold all of the stock of GATC's subsidiary, Fuller Company, to FA Holding Company, an entity owned by Fuller management and a private investor. Plaintiffs

are Fuller employees who claim they were entitled to enhanced early retirement benefits under the GATX Pension Plan as a result of the sale. The district court agreed and reversed the decision of the Plan Administrator to deny these benefits. We will reverse the judgment of the district court.

II.

The parties have stipulated to most of the relevant facts. At the time of the sale of the Fuller Company stock, approximately 600 Fuller employees were participants in the GAG Corporation NonContributory Pension Plan for Salaried Employees ("the Plan"). This Plan was a funded, defined benefit, non-contributory pension plan covering 'the employees of GATX Corporation and a number of its affiliated corporations. As the district court noted:

> The GATX Plan offers the following retirement options: (1) normal retirement (age 65); (2) 62/15 (unreduced benefit at age sixty-two

> provided that the employee has fifteen years of service); (3) 90 points (unreduced benefit available provided that the employee's age and years of service add up to ninety); (4) 75/80 points (unreduced benefit available in the event of plant shutdown, layoff, extenuating circumstances or disability available (i) when the employee is at least fifty-five and the employee's age and years of service add up to seventy-five or (ii) when the employee's age and years of service add up to eighty); and (5) 55/15 (retirement with an actuarially reduced benefit for employees who are at least fifty-five with fifteen years of service).

Kotrosits v. GATX Corp. Non-Contributory Pension Plan, 757 F. Supp. 1434, 1437 (E.D. Pa. 1991).

Here at issue is the 75/80 early retirement pension. For those who have not attained the age of 62 or an age and service time totaling 90, the 75/80 early retirement pension offers the only opportunity of receiving enhanced, early retirement benefits -- that is, benefits that are not determined by actuarially reducing full

pension benefits available at 65. The Plan provision governing the 75/80 pension stipulates:

> 4.5 75-80 Points Retirement. An Employee with at least 15 years of Service Credit who has not attained age 62, who either (i) has attained age 55 and whose age and Service Credit total at least 75, or (ii) whose age and Service Credit total at least 80, and
>
> (a) who has a Termination of Employment due to permanent shutdown of a plant, department or subdivision thereof, or due to layoff or disability, or
>
> (b) whose retirement is granted by and at the sole discretion of the Company, based on health impairment or other extenuating circumstances, may retire on the first day of the calendar month following the calendar month in which the applicable requirements of this Section 4.5 have been met.

Joint Appendix (hereinafter "J.A.") at 367-68.

Under the Plan, the Plan Benefits Committee is given the responsibility of making authoritative determinations concerning the meaning of the Plan and the scope of its benefits. That Committee is authorized:

(b) To construe the Plan and Trust Agreement;

(c) To determine all questions arising in its administration, including those relating to the eligibility of persons to become Participants; the rights of Participants and their beneficiaries; and its decisions thereon shall be final and binding upon all persons hereunder.

J.A. at 382.

Under the Fuller Company Stock Purchase Agreement, the closing date of December 31, 1986, effected "a termination of employment under the terms of [the Plan] for all Fuller Participants." J.A. at 497. W]hile the Plan remained responsible for all pension benefits accrued under the Plan as of that date, including those of shorter-term employees whose benefits had not yet vested, the Fuller Participants could accrue no additional benefits after that date.[1] Before the closing

[1]The Stock Purchase Agreement also contained an Indemnification clause, whereby GATX undertook to indemnify and defend Fuller against any claims alleging that Fuller

date, Fuller management announced its intention to sponsor a new Fuller Pension Plan, but such a plan was not in place at the time of closing. Under the new Fuller Plan as later established, pension benefits accrued for the Fuller Participants but at a slightly less favorable rate and did not vest for five years. Fuller was not contractually bound to GAG to sponsor its own Plan.

Prior to the closing, GATX had a medical and life insurance program that included its retirees. This was an unfunded program having no connection with the Plan other than their common sponsorship. GATX management made a decision to provide lifetime medical and life insurance to those Fuller employees who were in the employ of its subsidiary at the time of their retirement, but not to provide such

employees are owed subsidized early retirement benefits under the Plan, or under any pension plan maintained by Fuller, as a result of the leveraged buyout and the provisions of the Plan.

coverage for Fuller employees who retired after Fuller had severed its connection with GATX. Thus, a Fuller employee who was entitled to retire as of the closing date but who had not filed an application for pension benefits would receive no medical or life insurance from GATX's program when he or she retired from Fuller.

In the months preceding the closing date, Fuller management discussed the possibility of reducing the number of Fuller employees after the sale. No list of Job positions that might be eliminated was ever shown to anyone at GATX, however; indeed, GATX executives were told by Elmer Gates, Vice President, Chief Operating Officer, and soon-to-be Chairman of the Board of Fuller that "[w]e're going to hit the ground running. We look to continue the Fuller operation." 757 F. Supp. at 1439. On the first business day after January 1, 1987, all Fuller Company facilities in existence

prior to the sale were open for business and continued manufacturing and selling the same products that Fuller Company manufactured and sold prior to December 31, 1986.

Plaintiffs are Fuller employees who were Plan participants prior to the sale and who would have been eligible for 75/80 benefits in the event of a plant closing, layoff, disability, or management recognized extraordinary circumstances. One subclass, represented by plaintiffs Edwin Kotrosits and Julius Ruggeri, consists of employees who were eligible for early retirement under the 55/15 provision as of the closing date of December 31, 1986, but were not yet eligible under any other retirement options in the absence of one of those events. These employees retired before the closing date and retained their lifetime medical and life insurance coverage. The other subclass, represented by plaintiff Marvyn Souders, consists of employees who were

not yet 55 years old at the lime of the sale and who therefore could take early retirement, if at all, only under the 75/80 provision. Both subclasses Insist that they are entitled to 75/80 benefits.

None of the plaintiffs knew for certain whether they would have jobs with Fuller after the closing day, Wednesday, December 31, 1986. Plaintiffs Kotrosits and Ruggeri here told shortly before that date that they would receive a telephone call on the morning of Friday, January 2, 1987, instructing them whether to report to work. Both received a call that morning informing them that they did indeed have a job. Plaintiff Souders was told before the date of time sale to report to work on January 5, at which time he would be told whether his continued services would be needed.[2] Like the other plaintiffs, Souders

[2]Plaintiff Souders worked at the Fuller Bethlehem facility, where the first business day of 1987 was Monday, January 5. Plaintiffs

continued to perform the same duties after the sale.

After the Fuller sale, the class representatives pursued their claims for 75/80 benefits under the procedure set out in the Plan. They first presented their claims to the Plan Administrator, who denied them on the grounds that there had been no closing of a plant, department, or division, there had been no layoff, the claimants were not disabled, and a transfer of stock where the business continued was not an exceptional circumstance under 4.5(b) in the judgment of the Company. Kotrosits, Ruggeri, and Souders separately appealed the Administrator's decision to the Plan Benefits Committee, which consisted of the Chief Executive Officer of GATX, the Vice President and General Counsel of GATX, and the Vice President of Human Resources of GATX.

Kotrosits and Ruggeri worked at the Fuller Catasaqua plant, where the first business day of 1987 was Friday, January 2.

The Benefits Committee, after a meeting which was also attended by the Administrator and two other GATX attorneys, approved the Administrator's decision and denied the appeal based on the following factors: (1) GATX sold Fuller as a going concern; (2) Fuller had retained essentially the same employees as had been employed there before the sale; (3) Kotrosits, Ruggeri, and Souders all continued to work at Fuller; and (4) the Fuller sale resembled the prior Marine Transport Lines, Richmond Terminal, and GARD transactions, where no 75/80 benefits had been afforded, and did not resemble the Pollock and GATX Tank Erection Corporation ("TEC") transactions or the GATC Sharon, Pennsylvania, plant shutdown where 75/80 benefits had been applied for and granted.

In the Marine Transport Lines, Richmond Terminal, and GARD transactions, a stock dividend split-off and two asset sales, GATX

had sold portions of its operations as going businesses and virtually all employees continued working in those businesses after the sales. No 75/80 benefits were paid in connection with any of these transactions. In the Pollock, TEC, and GATX Sharon transactions, plant shutdowns were involved and the employees lost their Jobs. 75/80 benefits were paid.

Plaintiffs filed suit in the district court under the Employee Retirement Income Security Act of 1974 ("ERISA") to challenge the defendant's denial of their applications for 75/80 benefits.[3] The district court found that the Plan Administrator and the Benefits Committee had operated under a conflict of interest and refused to defer to their decision. The district court went on to hold

[3]Sections 502(a) and (e) of ERISA, 29 U.S.C. § 1132(a) and (e), provide that participants in pension plans may bring civil suits in federal district court to recover benefits due under the terms of the plan.

that the plaintiffs had suffered a "layoff" within the meaning of the Plan when they were terminated as of December 31, 1986. The district court thus agreed with plaintiffs that the Plan's denial of their 75/80 benefits constituted an abuse of discretion. Its opinion concludes with the following summary of its views:

> In sum, this court concludes that parties to a corporate sale of stock or assets must fully safeguard the pension rights of the corporate employees In the selling documentation. If, as in this case, the structure of the sale results in a portion of the transaction costs being shifted to the employees of the entity being sold, courts should scrutinize the corporate sale closely. Because ERISA imposes obligations on plan fiduciaries and sponsors that cannot be evaded by subterfuge, federal courts will not countenance tactics such as those employed by GATX In conjunction with the Fuller sale. Therefore, this court will order the Plan to award 75/80 point pensions to the Fuller salaried employees who met the age and years of

service requirements as of December 31, 1986.

757 F. Supp. at 1461.

III.

Alter the transfer of Fuller stock in the leveraged buyout, the employees remained employed by the same company, under the same management, at the same place, doing the same jobs, under the same conditions, for the same direct compensation. They lost no work time and accordingly no direct compensation. They were, however, affected by the transfer in three ways: First, when they left work on December 319 1986, they did not know whether they would be working at Fuller come the new year. Second, prior to the transaction, they had vested accrued benefits under the Plan and an expectation of future benefit accruals under the Plan, the latter being subject, however, to reduction or elimination at the discretion of GATX. Immediately after the transaction, the employees still had their

vested accrued benefits under the Plan, but their expectation of future accruals had been replaced with the possibility of future accruals under a yet-to-be adopted Fuller Pension Plan. Finally, prior to the transaction, the Fuller employees had an expectation of lifetime medical and life insurance benefits from GATX, subject, however, to the right of GATX to modify or eliminate the program giving rise to that expectation. Once the new year began, those who remained with Fuller no longer had an expectation of such benefits from GATX. The record does not disclose what medical or life Insurance benefits were available to Fuller employees from Fuller after the sale.

The parties agree that the transaction occasioned a termination of employment with a GATX affiliate for purposes of applying the Plan. The Plan provides a right to 75/80 benefits, however, only where there Is a

termination due to the permanent closing of a plant, department, or division, due to a layoff or due to disability. The issue in this case is thus whether employees In the position of these plaintiffs come within the intended scope of the class described in the Plan as employees termInated by layoff. The district court concluded that they are:

> Although concern about future employment does not constitute a layoff, temporary suspension of employment at the will of an employer certainly does.

757 F. Supp. at 1459.

It Is difficult to take issue with the district court's definition of a "layoff." The Plan can and does take issue, however, with the district court's view that what happened over the New Year's holiday break was a suspension of work. In the Plan's view, an employee who has lost no work time or salary cannot be said to have been suspended from work" or "laid off." It stresses that each of

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the other two situations which trigger a 75/80 pension benefit under 4.5(a) - permanent shutdown of a plant, department or subdivision thereof," and disability" involves the loss of work and salary, and insists that layoff should therefore be given its commonly understood meaning. The Plan further suggests that loss of a job was obviously intended to be the justification for granting an enhancement above an actuarially reduced pension and that 75/80 benefits should not be available in the absence of such a justification.

We agree with the Plan that the most common understanding of a layoff is a situation involving a loss of work time and direct compensation. Moreover, loss of direct compensation does provide a ratio decidendi for awarding enhancement. On the other hand, we have noted that severance pay benefits may be intended to compensate an employee for the

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possibility of lower salary and benefits even when his or her employment continues without interruption with a new employer. See Ulmer v. Harsco Corp., 884 F.2d 98, 103 (3d Cir. 1989); Bruch v. Firestone Tire and Rubber Co., 828 F.2d 134, 146 (3d Cir. 1987), reversed on other grounds, 489 U.S. 101 (1989). In Bruch, for example, we suggested that, at least in some circumstances, severance pay benefits triggered by a reduction in force," a concept which also generally includes a loss of employment and compensation, might be payable where assets are sold as a going concern and employment continues.

IV.

Before proceeding further, it is necessary to determine how much deference, if any, the district court should have accorded to the Benefits Committee's construction of the Plan. We therefore turn to that issue.

The Supreme Court recently spoke of the degree of deference due ERISA plan fiduciaries in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989). Noting that ERISA "abounds with the language and terminology of trust law," id. at 110, and after a brief examination of trust law sources, the Court found that de novo review of benefit eligibility determinations is usually appropriate. Id. at 112. General principles of trust law, however, do allow parties to agree to a narrower standard of review. Id. at 115. If a benefit plan invests the administrator with discretionary authority to determine eligibility for benefits under a plan, his decision must be reviewed under the more deferential "arbitrary and capricious" standard. Id. Finally, the Court instructed that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict

must be weighed as a facto[r] in determining whether there is an abuse of discretion. Id., quoting Restatement (Second) of Trusts § 187, Comment d ()959).[4]

[4]This provision of the Restatement provides as follows:

> d. Factors in determining whether there is an abuse of discretion. In determining the question whether the trustee Is guilty of an abuse of discretion in exercising or falling to exercise a power, the followIng circumstances may be relevant: (1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power: (4) the existence or non-existence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustees conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; (6) the existence or nonexistence of an interest in the trustee conflicting wIth that of the beneficiaries.

As formulated by the Supreme Court, then, the "arbitrary and capricious" standard in this context is shaped by the circumstances in which the administrator makes his decision. The Court thus implicitly adopted the position of some lower courts which had previously held that, where the claimant demonstrates that it would be inequitable to defer to the plan administrator, stricter scrutiny of his decision is In order. See Bruch, 828 F.2d at 139-40; Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052-53 (7th Cir. 1987).

The Plan involved in this case gives the broadest possible Interpretational authority to the Benefits Committee. The district court found, however, that the circumstances attending the Committee's decision were such that close scrutiny was appropriate. Specifically, the district court declined to give any deference to the Committee's decision

for four reasons. First, It concluded that GATX's duty to guarantee the actuarial soundness of the Plan created a conflict of Interest which Justified disregarding the Committee's decision. Second, it found that GATX and the Plan fiduciaries had been guilty of "bad faith." Third, the court noted that Plan fiduciaries rested their decision in part on the unavailability of 75/80 benefits in earlier transactions which the district court thought to be distinguishable. And finally, the district court concluded that close scrutiny rather than deference was appropriate because GATX had failed to "fully safeguard the pension rights of the . . . employees in the selling documentation." 757 F. Supp. at 1461. In their briefing and argument before us, plaintiffs have urged that no deference Is in order but have advanced somewhat different arguments in support of that proposition.

If we agreed with the view of either the district court or plaintiffs regarding the significance of the circumstances under which the Committee's decIsion was made, a reduced level of deference would be appropriate. For the reasons given below, however, we do not agree that the circumstances of the Committee's decision, or Its stated rationale, Indicate a danger of bias.[5]

[5]Findings of fact regarding the existence of interests that may affect decisions of an administrator are reviewable under the "clearly erroneous" standard. Sullivan v. Cuyler, 723 F.2d 1077, 1082 (3d Cir. 1983). The same is true for a finding of bad faith. Ford v. Temple Hospital, 790 F.2d 342, 347 (3d Cir. 1986). Nevertheless, while the district court's factual determinations regarding the circumstances under which the Committee's decision was made are entitled to a presumption of correctness, the court's decision that these circumstances warrant a reduced level of deference is a legal question subject to plenary review. See In re Diaz Contracting, Inc., 817 F.2d 1047, 1055 (3d Cir. 1987). In order to determine the proper level of deference due the committees decision, we must therefore undertake an independent evaluation of the significance of the alleged bias.

The district court acknowledged that the Plan conferred discretion on the Benefits Committee to determine whether benefits are payable. It further recognized that even where, as here, the Plan fiduciaries consist of management personnel, "the expense imposed on the sponsor of a fully funded plan will not usually create cause for searching judicial review." Id. at 1456. Nevertheless, the district court concluded that "the unique circumstances of this case" involved a conflict of interest that made deference inappropriate and required a "searching judicial review." It identified that conflict as follows:

> [T]he fact that the denial affected a large number of employees and resulted in estimated savings of at least two million dollars for the Plan undermines the rationale for deferential review. The larger the expenditure, the greater the possibility that the sponsor will eventually have to replenish the Plan's funds.

Id.

While the district court recognized that the two million dollars payable in 75/80 benefits would be the responsibility of the Plan and not GATX, it correctly noted that the Plan's liability for these benefits would render it more likely that GATX would be called upon to make future contributions in satisfaction of Its duty to maintain the actuarial soundness of the Plan. The district court made no more specific finding about the likelihood of GATX ultimately bearing the economic burden of any additional 75/80 benefits.

The record indicates that at all relevant tImes the market value of the Plan's assets far exceeded the benefits accrued to date based on current pay and service. As of January 1, 1986, the last audit date preceding the sale, the Plan assets had a market value of $103,584,044 and the value of all accrued

benefits was $94,796,280, leaving a surplus of $8.79 million. As of January 1, 1987, the day after the closing date, the Plan assets had a market value of $114,380,313 and the value of all accrued benefits was $104,184,071. There was thus a surplus of approximately $10.2 million at the time of the sale. It is, of course, impossible to predict the future, and it remains true that a Plan liability for $2 million in 75/80 benefits, even when amortized over a 15-year period,[6] makes "greater the possibility that [GATX] will eventually have to replenish the Plan's funds." 757 F. Supp. at 1456. Nevertheless, this record shows only an unquantified possibility that a different ruling from the Committee would have had a significant economic impact on GATX.

[6]The record shows that the impact on Plan assets of a different decision from the Committee would have been spread over a 15-year period.

Where the sponsor of a Plan reserves for the Plan administrators the discretion to Interpret the Plan, anyone urging that a court disregard that reservation has the burden of showing some reason to believe the exercise of discretion has been tainted. Brown, 898 F.2d at 1566. As noted above, where such a party shows the kind of conflict of interest that could realistically be expected to bias the decision makers, Bruch counsels in favor of withholding deference. Where, as here, however, the record shows no direct impact on the Plan sponsor and only a possibility of future indirect consequences to it, we conclude that it is appropriate to enforce the Plan as written and defer to the discretion of the Plan fiduciaries.

This conclusion Is consistent with our prior cases and the cases from other circuits that have examined similar issues. In the Bruch case, when we first suggested that the

degree of deference afforded to decisions of plan administrators should be reduced by a significant conflict of interest, we gave as examples unfunded plans where benefits come directly from the sponsor s assets and funded plans where the sponsor's contributions each year are determined by the cost of satisfying plan liabilities in the immediately preceding year. 828 F.2d at 137-38. In such situations, there is a substantial likelihood that the cost of additional benefits will be borne by the sponsor, the employer of the plan administrators. Neither we nor any other court of appeals of which we are aware, however, has suggested that a sponsor's duty to maintain the actuarial soundness of a funded plan with a substantial surplus Is alone enough to require de novo review. See De Nobel v. Vitro Corp., 885 F.2d 1180, 1191 (4th Cir. 1989) (no presumptive bias" is attributable to administrators of fully

funded, defined benefit plan); Lowry, 871 F.2d at 525 n.7 (suggesting that no conflict of interest is inherent in defined benefit plans where employer merely guarantees actuarial soundness of plan); Oster v. Barco of California Employees' Retirement Plan, 869 F.2d 1215, 1217-18 (9th CIr. 1988) (although any decision which enhances the financial viability of the plan reduces potential for employer contributions, this is not sufficient to prove conflict of interest; "[a] contrary conclusion would mean that we must always consider trustees of a defined benefit plan as subject to a conflict of interest, which we are unwIlling to do"). See also Woolsey v. Marion Labs. Inc., 934 F.2d 1452, 1459-60 (10th Cir. 1991) (mere possibility that administrators of profit-sharing plan could benefit from denial of former employee's request that he receive part of his benefit in

employer's stock is insufficient to show presumptive conflict of interest).

The district court also cited two Instances of "bad faith" in support of its decision to deny deference. It first faulted GATX's managerial staff for not telling Fuller employees whether they would have Jobs after the sale. It then criticized the Plan trustees" for "coerc[ing] the plaintiffs into accepting actuarially reduced benefits by threatening the loss of lifetime medical and life insurance benefits." 757 F. Supp. at 1457. We find both of these criticisms puzzling. Neither seems warranted by the record and both appear unrelated to the Committee's decision to deny 75/80 benefits. The parties stipulated and the district court found, as follows:

> 33. Mr. Gates never directly told anyone at GATX or the Plan that there was a possibility of a reduction in force at Fuller being discussed by the members of FA Holding.

34. Prior to the December 31, 1986 sale date, FA Holding did not provide Mr. Herbert, the Plan Administrator, with any information identifying what persons, if any, Fuller intended to terminate following the sale.

35. No list of job positions that might be eliminated at Fuller after the sale was ever shown to anyone at GATX.

36. Mr. Herbert understood that FA Holding was buying Fuller as a "continuing business.

37. Mr. Gates of FA Holding advised GATX that Fuller was being sold as a continuing business.

757 F. Supp. at 1439. Assuming, however, that someone at FA Holding did tell GATX or the Plan about Its tentative post-closing business plans, we do not see how GATX or the Plan can be found responsible for failing to advise the employees of possible actions over which they had no control, or how their failure to so inform represents an act of bad faith.

With respect to the alleged coercion of the Ruggeri subclass, we note that the Plan had nothing to do with the decision not to

extend GATX's medical and life insurance program to employees who retired after the closing. Moreover, as the district court acknowledged, GATX had no legal obligation to extend that program to retirees from an unaffiliated firm. Finally, we do not understand the coercive aspect of the situation. The Ruggeri subclass had the choice to take early retirement or not to take early retirement. By taking early retirement and availing Itself of GATX's Insurance program, that group did not sacrifice Its claim to enhanced, early retirement benefits. If that group were entitled to enhanced benefits, it could recover them in this suit.

The district court distinguished the Fuller transaction from the prior transactions in which the Plan denied 75/80 benefits on the basis that in the earlier cases "the employees continued working for the new owner with their pension rights largely unaffected by the sale

or spinoff." 757 F. Supp. at 1457. It will be recalled that the Committee, in concluding that a "termination by reason of layoff required a loss of work, relied In part on the fact that in prior situations 75/80 benefits had not been paid when the employees lost no work and had been paid when the employees had lost work. We agree with the district court that the Fuller transaction was different In the described way from the earlier transactions in which 75/80 benefits were not paid. Nevertheless, we do not view the Committee's reasonable reliance on a perceived correlation between a loss of work and 75/80 benefits as rendering suspect the Committee's exercise of Its discretion.

Finally, the district court's summary of its conclusion reveals that it was deeply troubled by GATX's failure to secure a commitment from Fuller to assume responsibility for the pension benefits that,

absent a modification or termination of the Plan or the sale to Fuller, would have accrued in the future under the Plan. In the district court's view, this defalcation should occasion close scrutiny of the decision to deny 75/80 benefits. We understand the district court's concern that benefits under the new Fuller Pension Plan were lower than those under the GATX Plan.[7] At the same time, when GATX

[7]The extent to which pension benefits will decrease under the Fuller Plan is a matter of some disagreement. Defendants have produced expert testimony to the effect that, if 75/80 benefits are denied, the projected pension benefits of the Ruggeri subclass will decrease by 6.24% while those of the Souders subclass will decrease by 26.61%. Plaintiffs, on the other hand, predict that the benefits of the Ruggeri subclass will decrease by 31.08%, and those of the Souders subclass will decrease by 36.95%. These projections, of course, assumed that pension rates under the two plans would remain constant. In the event that 75/80 benefits are granted as a result of the Fuller sale, and plaintiffs continue to work and earn credit toward a second Fuller Company pension, defendants project that the Ruggeri and Souders subclasses would enjoy pensions 22% and 60% higher than if the sale had never occurred, while plaintiffs contend that these benefits will increase by 8.36% and 35.87%, respectively. Joint Appendix at 155,

established the Plan, it neither agreed to guarantee nor agreed to get anyone else to guarantee that employees would be able to accrue benefits at the initial Plan rates for the work life of the employees. As we have made clear on prior occasions. Congress made a deliberate decision that ERISA would not require such a guarantee from the sponsoring employer. Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155, 1161-62 (3d Cir. 1990). It follows that GATX's failure to "fully safeguard" the pension expectations of Fuller employees does not provide a justification for refusing to defer to the judgment of the Committee regarding the availability of 75/80 benefits.

We thus conclude that the district court identified no basis for disregarding the delegation of discretion to the Plan Benefits Committee. Similarly, we conclude that the

189-90.

somewhat different tack taken by the plaintiffs before us is unpersuasive.

The plaintiffs make two additional arguments before us concerning the scope of review. First, they insist that the GATX Plan was in fact underfunded at the time of the transaction. They point out that the Plan's "accrued benefit" figure "includes only benefits earned as of the valuation date; it does not anticipate future service or future salary increases which will undoubtedly occur." Brief for Appellee at 10, n. 8. Plaintiffs assert that when future accruals are taken into account, the "accrued liability" of the Plan as of January 1, 1987, was $116,424,087, which was $2,043,774 greater than the $114,380,313 market value of the Plan assets on that date. It appears to us that the plaintiffs are comparing apples and oranges when they contrast an accrued liability figure including future accruals

with current market value of the assets, but, whether or not that impression Is accurate, the fact remains that the record will not justify de novo review. Plaintiffs have tendered nothing from which the district court could find a substantial likelihood of a significant adverse impact on GATX from the grant of 75/80 benefit to the plaintiffs.

The record is also not sufficiently developed to permit acceptance of plaintiffs' final theory. Plaintiffs argue before us for the first time that a Committee decision granting 75/80 benefits would have entitled the Souders subclass to early retirement prior to the sale and would have thereby exposed GATX to additional expense in connection with its medical and life insurance program. The record is devoid of any evidence, however, regarding this program or the costs associated

with it.[8] There is, accordingly, no basis here for concluding that the Committee had a conflict of interest.

In summary, we find no justification in this record for failing to give effect to the provisions of the Plan granting discretion to the Benefits Committee to determine the availability of benefits. Accordingly, we hold that the district court should have determined only whether the Committee's view of a "termination due to layoff was a reasonable one.

[8]GATX represents in its briefing that if plaintiffs had raised this issue before the close of the evidence and the Issuance of the district court's decision, the Plan would have submitted evidence showIng (a) the cost of providing benefits for the 24 members of the Souders subclass was insignificant when compared to GATX's annual expense in providing benefits for the current 4,000+ plan members and (b) the cost of providing benefits to the subclass would be further reduced because GATX's obligations arise only when the participant's current health insurance is inadequate - and the entire Souders subclass was due to receive health insurance from Fuller company.

V.

Section 4 of the Restatement (Second) of Trusts (1959) provides:

The phrase "terms of the trust" means the manifestation of intention of the settlor with respect to the trust expressed in a manner which admits of Its proof in judicial proceedings.

Comment d. to this section of the Restatement explains the proper approach to the interpretation of the provisions of a written instrument creating an inter vivos trust:

> If a trust is treated by a transaction inter vivos and is evidenced by a written Instrument, the terms of the trust are determined by the provisions of the instrument as interpreted in the light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as Is not inadmissible because of the Statute of Frauds, the parol evidence rule, or some other rule of law.

Comment a. adds:

> The manifestation of intention of the settlor is the external expression of his intention as distinguished from his undisclosed intention.
>
> . . .
>
> The intention of the settlor which determines the terms of the trust is his intention at the time of the creation of the trust and not his subsequent intention. The intention of the settlor at the time of the creation of the trust may, however, be shown by facts occurring after that time to the extent that evidence of such facts is admissible to show such intention under the rules of evidence.

The Plan Benefits Committee had before it the relevant text of the Plan and the history of the administration of that text at the times of corporate transactions affecting participants. No one tendered evidence of other surrounding circumstances alleged to be helpful in ascertaining the sponsor's intent at the time the Plan was established.

As we have earlier noted, the text of the Plan conferred upon the Benefits Committee discretion to determine the original intent of

the sponsor. As far as the remaining relevant text of the Plan is concerned, we conclude that the Committee's interpretation was clearly a reasonable one. The text of § 4.2, read literally, provides that 75/80 benefits are triggered not by every termination of employment but rather only by those terminations which result from a permanent closing of a plant, department, or division, a layoff, or disability. As the district court recognized, a "layoff," in common parlance, involves a suspension of employment, which we believe, in common parlance, involves the loss of some work time and direct compensation. Moreover, looking at the benefit provisions of the Plan as a whole, construing the plan as the Committee does provides a coherent raison d'etre for the enhancement bestowed by § 4.2.

The case law existing at the tIme of the Committee's denial of benefits provided support for its view. See, e.g., Holland v.

Burlington Indus., Inc., 772 F.2d 1140, 1149 (4th Cir. 1985) (denial of severance benefits "reasonable" where plan provided for severance upon "job termination" and employees of company subsidiary continued to work in same Jobs upon sale of subsidiary to new parent), cert. denied 477 U.S. 903 (1986); Sly v. P.R. Mallory & Co., 712 F.2d 1209, 1212-13 (7th Cir. 1983) (denial of severance reasonable" where plan provided benefits in event of "separation" caused by reduction in force" and claimants continued to work in same jobs upon sale of subsidiary); Esler v. Northrop Corp., No. 20537-B (W.D. Mo. Aug. 4, 1981) (where plan called for pension benefits upon "layoff, claimants had no right to pension where they continued to work In the same job with successor employer).

Courts facing the issue more recently have also confirmed the reasonableness of the Committee's decision. See, e.g., Blank v.

Bethlehem Steel Corp., 926 F.2d 1090, 1092 (11th Cir. 1991) (upholding administrator's decision that early retirement benefits triggered by "layoff or disability" were not available where claimants continued in same job with successor employer), cert. denied, 112 S. Ct. 372 (1991); Rowe v. Allied Chem. Hourly Employee Pension Plan, 915 F.2d 266, 269 (6th Cir. 1990) ("it is clear that, even under a de novo interpretation of the Allied Plan, the ... plaintiffs' separation from Allied and immediate employment with Armco ... did not constitute a layoff); cf. Harper v. R.H. Macy & Co., Inc., 920 F.2d 544, 545 (8th Cir. 1990) ("the plan's language does not permit an interpretation that employees who continue to work without interruption on comparable terms for the purchaser of their

employer's business have been 'permanently terminated' by the sale").[9]

[9]Appellees cite several cases holding that employees were entitled to pension or welfare benefits upon the sale of their employer despite the fact that their jobs were not interrupted; but these plans contained language different from that of the Plan in this case. In Bellino v. Schlumberger Technologies, Inc., 944 F.2d 26 (1st Cir. 1991), employees who were "terminated" due to "lack of work" were entitled to severance pay under their benefit plan; the court held that maintenance workers who were terminated by one employer upon cancellation of a maintenance contract and subsequently rehired by another, and who continued to perform the same work without missing a day of employment, met both of these conditions. Id. at 30-33. See also Ulmer, 884 F.2d at 102-04 (plan stating that when employment is terminated, the [employer] ... will make severance payment" entitles employee to severance where termination results from sale of company division, but employees retain their jobs under new employer); Harris v. Pullman Standard, Inc., 809 F.2d 1495, 1498-99 (11th Cir. 1987) (employees offered jobs by purchaser company entitled to severance where benefit plan stated "for all involuntary terminations, other than lay-off, the termination allowance will be granted"; layoff was explicitly defined in plan as separation from employer with intention of later recall); Blau v. Del Monte Corp., 748 F.2d 1348, 1354-55 (9th Cir. 1984) (employees of purchased company entitled to severance where plan provides for such pay when jobs are "eliminated" and alternative employment is not available with original

Turning from the text of the Plan to its administration, the Committee correctly noted that 75/80 benefits had not been paid when, on three prior occasions, portions of GATX's business had been sold as a going concern and the employees had continued to work without interruption. It may be true, as the district court stressed and as noted above, that on each of those three occasions the employees' pension benefits were "largely unaffected" by the transaction and arguably this reduces their value as precedent in this particular situation. Even if that argument be accepted, however, there still would be no evidence of prior Plan administration suggesting that the sponsor intended for 75/80 benefits to be paid in a situation of this kind.

corporation), cert. denied, 474 U.S. 865 (1985). While some of these cases would provide some support had the Committee decided to grant 75/80 benefits, none indicate that the position the Committee in fact took was unreasonable.

In sum, the Benefits Committee has tendered a reading of § 4.2 that fits comfortably with the text of that section and the remainder of the Plan and does not conflict with any other evidence regarding the intent of the sponsor. As we have indicated, it is unnecessary for us to conclude that the Committee's reading fits more comfortably with the evidence of the sponsor's intent than that of the plaintiffs. It suffices to find, as we do, that the Committee's reading is a reasonable one. Bruch, 109 S.Ct. at 954.

VI.

For the reasons given above, we will reverse the decision of the district court and

direct the entry of a judgment consistent with the decision of the Benefits Committee.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN KOTROSITS, JULIUS RUGGERI, and MARVYN SOUDERS, on their own behalf and on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES	:	NO. 88-1835

O R D E R

CAHN, J. February 25, 1991

AND NOW, in accordance with the foregoing opinion, IT IS ORDERED that

1. The Ruggeri subclass, representing Fuller salaried employees who applied for 75/80 benefits but received only 55/15 benefits, is CERTIFIED;

2. The Souders subclass, representing the Fuller salaried employees who applied for

75/80 benefits and were not eligible for 55/15 benefits, is CERTIFIED;

3. The plaintiffs' request for a Declaratory Judgment that the Defendant Plan must pay 75/80 pension benefits is GRANTED;

4. The defendant Plan must award the Ruggeri and Souders subclasses 75/80 pensions retroactive to December 31, 1986;

5. The defendant Plan must allow the Souders subclass to retire retroactive to December 31, 1986 and award the Souders subclass lifetime welfare benefits available to Fuller employees who retired prior to December 31, 1986;

6. The within case is REMANDED to the Plan for actions consistent with this opinion and order.

BY THE COURT:

_____

Edward N. Cahn, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWIN KOTROSITS, JULIUS RUGGERI, and MARVYN SOUDERS, on their own behalf and on behalf of all others similarly situated	:	CIVIL ACTION
v.	:	
GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES	:	NO. 88-1835

O P I N I O N

CAHN, J. February 25, 1991

In this dispute over the extent to which the defendant owes the plaintiffs pension benefits, the parties have filed extensive pre-trial and post-trial briefs, 'stipulations of facts, and exhibits. After a non-jury trial, I make the following:

FINDINGS OF FACT[10]

1. The Parties

(a) The representative plaintiffs are:

(i) Edwin Kotrosits, a resident of Coplay, Pennsylvania for more than 30 years. S.1.

(ii) Julius Ruggeri, a resident of Bethlehem, Pennsylvania for more than 30 years. S.19.

(iii) Marvyn Souders, a resident of Orefield, Pennsylvania for more than 30 years. S.29.

(b) The defendant is the GATX Corporation NonContributory Pension Plan for

[10]No evidence was introduced at trial, as the parties stipulated to the facts of this case. Thus, the findings of fact in this section are drawn from the parties' Stipulation ("S."), Supplemental Stipulation ("5.5."), and Stipulated Exhibits ("Exh."). This court has omitted some of the stipulations on the basis of relevancy and has drawn inferences of fact from the evidence before it.

Salaried Employees ("the Plan"), a defined benefit, non-contributory pension plan, qualified under ERISA, covering salaried employees of GATX Corporation and other participating employers. Exh.3. No amendments were made in 1986 to any provisions of the Plan at issue in this lawsuit. S.35.

(c) The Plan is administered from and is amenable to service at 120 South Riverside Plaza, Chicago, Illinois, 60606. S.36.

(d) From January 1, 1986 to the present, James A. Herbert has been Plan Administrator. S.37.

(e) From May, 1980 to January, 1986, Samuel E. Kohler was Plan Administrator. S.38.

B. **The Relationship of GATX and Fuller**

(f) On or about August 17, 1954 GATX Corporation ("GATX"), then called General American Transportation Corporation, purchased

all of the outstanding shares of Fuller Company, a Delaware corporation. S.35.

(g) In 1975 General American Transportation Corporation ("GATC") was formed as a GATX subsidiary. From 1975 to December 31, 1986, Fuller Company ("Fuller") was a subsidiary of GATC and a second-tier subsidiary of GATX. S.41. Between 1954 and December 31, 1986, Fuller was a wholly-owned direct or indirect subsidiary of GATX. S.40.

(h) On December 31, 1986 pursuant to a Stock Purchase Agreement, GATX Corporation caused GATC to sell all of its shares of Fuller Company stock to F A Holding Corporation ("F A Holding"). I shall refer to this transaction as the "Fuller sale." S.68 and Exh.13.

(i) As of the morning of December 31, 1986, Fuller owned and operated facilities in Allentown, Bethlehem, Catasaugua, and

Mannheim, Pennsylvania, as well as certain' subsidiaries and foreign operations. S.44.

(j) As of December 31, 1986, there were approximately 664 Fuller salaried employees who were participants in the Plan. Of these, sixty-six were at Fuller's Compton facility, which was not included in the Fuller sale. S.45.

(k) From 1954 to the present, Fuller Company has had its world headquarters in Bethlehem, Pennsylvania. S.43.

(l) GATX and GATC have had their corporate headquarters in Chicago, Illinois at all times relevant to this litigation. S.42.

C. The GATX Pension Plan and Fuller

(m) GATX first adopted its separate pension plan for salaried employees of GATX and participating subsidiaries on January 1, 1965. S.64.

(n) Effective January 1, 1965, upon receiving authorization to do so, Fuller

Company adopted the Plan and became an "Affiliated Company." S.65.

(o) The GATX Board of Directors appoints the members of the Benefits Committee for the Plan. S.66.

(p) Before the Fuller sale, Fuller (not GATX) made contributions to the Plan on behalf of Fuller employees.
S.S.15.

(q) GATC, a GATX subsidiary and Fuller's parent, provides limited health care and life insurance benefits for retired employees who meet established criteria. Most domestic employees are eligible for the insurance benefits as they retire under the GATX plan. GATC pays the premium for this coverage provided by an insurance company. The premiums are allocated to GATC based on benefits Paid during a particular year; S.6.

(r) The GATX Plan offers the following retirement options: (1) normal

retirement (age 65); (2) 62/15 (unreduced benefit at age sixty-two provided that the employee has fifteen years of service); (3) 90 points (unreduced benefit available provided that the employee's age and years of service add up to ninety); (4) 75/80 points (unreduced benefit available in the event of plant shutdown, layoff, extenuating circumstances or disability available (i) when the employee is at least fifty-five and the employee's age and years of service add up to seventy-five or (ii) when the employee's age and years of service add up to eighty); and (5) 55/15 (retirement with an actuarially reduced benefit for employees who are at least fifty-five with fifteen years of service. Exh.3, Article 4.

D. The Fuller Bale

1. <u>The Structure of the Sale</u>

(s) In May, 1985 Elmer Gates, then President and Chief Operating Officer of

Fuller Company, learned from Ken Krick that Fuller was for sale. Ken Krick was, at that time, Chairman of Fuller and a Senior Vice President at GATX. S.S.1.

(t) Elmer Gates and five other members of Fuller's senior management (John Leidner, John Alogna, Ervin Decker, Gopal Kapoor, and Gerald Labelle) formed F A Holding to purchase the shares of Fuller from GATC through a management leveraged buyout. S.69.

(u) During 1986 several entities, including Ecolaire, Peter Robbins, and Polysius (a German company), discussed with GATX the possibility of acquiring Fuller.

(v) Shortly before October 12, 1986, GATX decided to sell Fuller to F A Holding. The parties agreed to structure the transaction as a sale of stock rather than a sale of assets. S.71.

(w) The members of Fuller senior management effectuating the buyout retained

their job titles following consummation of the sale on December 31, 1986, although Elmer Gates also became Chairman of the Board of Fuller Company at that time. S.70.

(x) The draft stock purchase agreement prepared by GATX and/or its legal counsel contained the following clause:

> GATX Salaried Pension Plan. Certain salaried employees of Fuller participate in the GATX Salaried Pension Plan. Effective as of the first day of the calendar month in which the Closing Date occurs (the "Spinoff Date"), GATX shall spinoff the portion of the GATX Salaried Pension Plan attributable to current and former Fuller employees, which spunoff portion shall be known as the Fuller Salaried Pension Plan. The amount of assets transferred to the Fuller Salaried Pension Plan shall be equal to the sum of (i) the present value of all accrued benefits of current and former Fuller employees determined as of the Spinoff Date on the basis of the actuarial

assumptions used by the actuary for the GATX Salaried Pension Plan to determine the present value of accrued benefits under that plan as of January 1, 1986, plus (ii) interest at the rate of 8-1/2% per annum on such present value from the Spinoff Date to the date of transfer. On and after the Spinoff Date the Fuller Salaried Pension Plan shall be responsible for all pension and ancillary benefits attributable to current and former Fuller employees. Prior to the Closing Date, Fuller shall have contributed its allocable portion of the minimum funding amount required under section-412 of the Code for the GATX Salaried Pension Plan 'with respect to that portion of the 1986 plan year which precedes the Spinoff Date and shall have taken all steps necessary to adopt the Fuller Salaried Pension Plan.

S.93 & Exh.15.

(y) The final agreement did not contain the above-quoted language. Section S.10(b) of the final agreement provided:

> GATX Salaried Pension Plan. Certain salaried employees of Fuller participate in the GATX Salaried Pension Plan and shall be referred to as "Fuller Participants" for purposes of this subsection 5.10(b). It is understood that the Closing Date hereunder is a Termination of Employment under the terms of the GATX Salaried Pension Plan for all Fuller Participants, and that Fuller will cease to be an Employer under the GATX Salaried Pension Plan as of the Closing Date. Effective as of the Closing Date GATX shall cause the GATX Salaried Pension Plan to be amended to provide that Fuller Participants employed by Fuller on the Closing Date will be fully vested in their normal retirement benefit accrued as of the Closing Date under the GATX Salaried Pension Plan. GATX shall indemnify and defend, at its own expense, Fuller and Purchaser and any pension

plan for salaried employees maintained by Fuller or Purchaser against any and all claims, liabilities, losses, damages, costs and expenses relating to or arising directly or indirectly out of a claim that GATX Salaried Pension Plan is required, under its terms as in effect on or before the Closing Date, to provide subsidized early retirement benefits to Fuller Participants, or out of a claim that Fuller or Purchaser or any salaried pension plan maintained by Fuller or Purchaser is required by law to provide subsidized early retirement benefits to Fuller Participants because of the provisions of the GATX Salaried pension Plan as in effect on or before the Closing Date.

S.94 & Exhs.13 & 15.

(z) The phrase "subsidized early retirement benefits" in Section 5.10(b) of the Stock Purchase Agreement between GATX, GATC and FA Holding referred to the 62/15, the

75/80, and the 90 point pensions. S.109; see Finding of Fact 18.

(aa) Section 5.10(i) of the Stock Purchase Agreement states, in relevant part:

> Retiree Benefits. Effective as of the Closing Date, the Purchaser shall cause Fuller to reimburse GATX without any right of setoff for $600,000 of the annual costs incurred by GATX in continuing to provide health and welfare benefits being provided as of the Closing Date to former employees of Fuller who have retired prior to the Closing Date, such reimbursement to be made within 30 days after receipt of monthly invoices from GATX setting forth in reasonable detail the calculation of such costs . . .

Exh. 13.

(ab) "Discontinued operation" is an accounting term, defined in Paragraph 401 of Section I13 of the FASB Accounting Standards, (General Standards as of 1986), that is used

to describe sales and other dispositions of businesses. S.S.34 & Exh.45.

(ac) Ralph O'Hara, Treasurer of GATX Corporation, relied on Paragraph 401 in characterizing the Fuller Company leveraged buyout as a "discontinued operation" in the 1986 GATX Corporation Annual Report and in GATX Corporation's filings with the Securities and Exchange Commission. S.S.35 & Exh.46.

2. The Sale's Effect on Employment at Fuller Company

(ad) As of October, 1986, F A Holding had made no decisions regarding the continued employment of employees at Fuller corporate headquarters. S.S.7.

(ae) In a private placement memorandum dated October 1986, F A Holding stated that it planned to reduce the number of employees at Fuller corporate headquarters by as many as twenty-seven persons. The same

memorandum discussed the possible closing of the Fuller Catasauqua facility. Exh.24.

(af) In late December, 1986 the principals of F A Holding discussed reducing the number of employees at Fuller. S.S.9 & Exh. 37.

(ag) Mr. Gates never directly told anyone at GATX or the Plan that there was a possibility of a reduction in force at Fuller being discussed by the members of F A Holding. S.S.10 & Exh. 35.

(ah) Prior to the December 31, 1986 sale date, F A Holding did not provide Mr. Herbert, the Plan Administrator, with any information identifying what persons, if any, Fuller intended to terminate following the sale. S.77.

(ai) No list of job positions that might be eliminated at Fuller after the sale was ever shown to anyone at GATX. S.S.11.

(aj) Mr. Herbert understood that F A Holding was buying Fuller as a "continuing business." S.75 & Exh.36.

(ak) Mr. Gates of F A Holding advised GATX that Fuller was being sold as a continuing business. S.S.14 & Exh.36.

(al) On November 19, 1986 there was a meeting at Fuller World Headquarters to discuss the effects of the Fuller sale. The GATX plan administrator paraphrased Elmer Gates as stating at that meeting that, "We're going to hit the ground running. We look to continue the Fuller operation." S.S.38 & Exh.48.

(am) On the first business day after January 1, 1987, all Fuller Company facilities in existence prior to the sale were open for business and continued manufacturing and selling the same products that Fuller Company manufactured and sold prior to December 31, 1986. S.79.

(an) After the sale of December 31, 1986, no Fuller Company facilities ceased operations until April 30, 1987. S.S.8.

(ao) In late 1986 Mr. Earl Herman, then Personnel Manager at Fuller Company, became aware that some Fuller employees might not be needed after the sale to F A Holding. Exh.42.

(ap) After January 1, 1987, Earl Herman prepared a handwritten list of Fuller employees who were terminated on either January 2 or January 5, 1987. Mr. Herman compiled this list to advise Fuller Company's Payroll Department of what wages had to be paid and what severance or vacation payments had to be made. Mr. Herman never provided this list to anyone at GATX Corporation or the Plan. S.S.27 & Exh.41.

(aq) Lois Smith, one of the people included in Mr. Herman's list of terminated

Fuller employees, worked under the supervision of Earl Herman prior to her January 5, 1987 termination. Mr. Herman decided to terminate Ms. Smith, because she had "very limited capabilities" and there was no place where she could be used productively. Although he made that determination in December, 1986, Mr. Herman was instructed not to tell Ms. Smith of her termination until after January 1, 1987.

(ar) Mr. Herman testified at deposition that other people who held supervisory positions were also told to wait until after January 1, 1987 to make any communications to inform people of their impending employment termination.

(as) Before December 31, 1986, Elmer Gates knew that Fuller employees had expressed concern about having jobs after the Decor 31, 1986 buyout. S.S.17.

(at) At a pre-December 31, 1986 communication session with Fuller employees,

Elmer Gates advised the retiring employees that their supervisors would notify them after January 1, 1987 concerning whether or not they had a job at Fuller Company. S.S.30.

(au) After January, 1987, there was a reduction in the number of salaried employees working at various locations for Fuller. Twenty-two employees were terminated, nineteen of whom were salaried. Elmer Gates made the decision to carry out that reduction and those terminations during the working days immediately after January 1, 1987. S.S.18 & Exh.37.

(av) Fuller informed the terminated employees of Gates' decision on the first working day after January 1, 1987. S.S.19.

(aw) None of the Fuller employees terminated in the first week of January, 1987 is a member of either the Ruggeri or Souders subclasses in this litigation. S.S.32.

(ax) After January 1, 1987, Fuller management eliminated at least two senior management and/or other supervisory positions at Fuller. S.S.20.

(ay) Between July 31, 1986 and December 31, 1986, no layoffs occurred at any Fuller facility, aside from the alleged layoffs suffered by the plaintiffs. S.76.

3. The Sale's Effect on Fuller Benefits

(az) On or before November 7, 1986 Mr. Berbert determined that Fuller employees would not be eligible for 75/80 point benefits under Section 4.5 of the Plan because neither layoffs nor plant shutdowns would occur upon the sale of Fuller stock. In making that determination, Mr. Herbert took into consideration the structure of the transaction and the fact that the principals of F A Holding planned to maintain Fuller as an ongoing company. S.72.

(ba) On November 7, 1986 Mr. Herbert, Mr. Ronald Ciancio, GATX's Assistant General Counsel, and Mr. Krick met to resolve certain pension-related issues. At that meeting, they reached the following decisions: 1) no 75/80 pensions would be granted as a result of the Fuller sale; 2) only employees who retired on or before December 31, 1986 would be entitled to medical and life insurance benefits; and 3) no service credit would be granted after December 31, 1986. To the best of Mr. Herbert's recollection, although Mr. Krick disagreed with the decision to deny 75/80 point benefits, Mr. Ciancio agreed. Exhs.78 & 86.

(bb) On or before November 7, 1986 Earl Herman also concluded that employees at Fuller facilities would not be eligible for 75/80 point benefits due to the sale. Mr. Herman is a member of the Souders subclass, and he has not opted out. Messrs. Kotrosits,

Souders, and Ruggeri disagree with Mr. Herman and believe that they are eligible for 75/80 point benefits under the terms of the Plan. S.73 & Exh.40.

(bc) Prior to the Fuller sale, GATX adopted the policy that retirees' medical and life insurance benefits provided by GATC for retirees would be available only to those Fuller employees who submitted retirement applications prior to December 31, 1986. Participants who submitted retirement applications after that date were permitted to retire retroactively in accordance with the terms of the Plan, but those persons would not receive the lifetime medical and life insurance benefits. S.7.

(bd) GATX did not cancel the retiree medical and life insurance benefits for all employees covered by the Plan. The decision to discontinue the retiree benefits apparently only affected Fuller employees. Exh.86.

(be) At a November 19, 1986 meeting, James Herbert advised Fuller employees, including Messrs. Kotrosits, Ruggeri and Souders, that if they did not submit a pension application form prior to December 31, 1986, they would not receive lifetime medical and life insurance benefits. S.10.

(bf) At the November 19 meeting, Mr. Herbert also informed the employees, for the first time, that they would not be eligible for 75/80 point benefits under the Plan. S.74.

(bg) As of January, 1987, Fuller did not continue to offer comparable lifetime medical or life insurance benefits to its employees. S.9.

(bh) Plan participants employed at Fuller who retired on or prior to December 31, 1986 locked in the lifetime medical and life insurance benefits. S.8.

(bi) The Plan has never received a 75/80 point pension application from any Fuller employee and Plan participant who ceased working at a Fuller facility on or after January 2, 1987. S.78.

C. **The Decision of the Plan**

(bj) On or about July 8, 1986 GATX personnel began considering the impact on the Plan of a potential sale of Fuller. S.82.

(bk) The following persons, among others, were involved in that process:

From GATX:

a. Ronald Ciancio, Esquire
Assistant General Counsel, GATX

b. James A. Herbert

c. Kenneth Krick

d. John Levin, Esquire

From Mayer, Brown & Platt,
Outside Counsel for GATX
in the sale of Fuller:

a. Herbert Krueger, Esquire

From Hewitt & Associates.
consulting actuaries for

GATX and GATX Pension Plan:

a. Lynn Cornwall, Actuary S.83.

(bl) Mr. Krick was the primary GATX negotiator with F A Holding. S.84.

(bm) For at least the past five years, Hewitt and Associates has served as the pension actuaries for the GATX Non-Contributory Pension Plan for Salaried Employees. S.96.

(bn) During the past five years, Lynn Cornwall has been the Hewitt and Associates employee who has had primary responsibility for performing the pension actuary work and consulting services. S.97.

(bo) Prior to October 12, 1986, Mr. Herbert obtained from Hewitt and Associates an outline of various scenarios potentially resulting from the sale of Fuller to some other entity. Additionally, Mr. Herbert obtained cost estimates from Hewitt &

Associates for alternatives under consideration.
S.85.

(bp) Prior to October 12, 1986, Hewitt and Associates told Mr. Herbert that the award of 75/80 point benefits to Fuller personnel would cost the GATX Pension Plan at least $2 million in excess of the cost which would otherwise be incurred as a result of the closing of the F A Holding/GATX transaction. S.88.

(bq) Mr. Krick asked Mr. Herbert for all information on the Plan under all circumstances, because the potential buyers of Fuller were interested in that information in complete detail. S.99.

(br) After Mr. Herbert spoke with Ms. Cornwall on October 10, 1986 and received certain actuarial calculations which she had performed, he communicated that information to Mr. Krick. S.103.

(bs) Prior to October 12, 1986, Mr. Herbert knew that F A Holding would not assume the assets and liabilities of the GATX Pension Plan applicable to Fuller employees. S.86.

(bt) Prior to October 12, 1986, Mr. Herbert knew that GATX intended to terminate the participation of Fuller employees in the GATX Pension Plan effective upon the closing of the F A Holding/GATX transaction. S.87.

(bu) Mr. Herbert did not contact Mr. Gates to discuss the future of Fuller until mid-November, 1986. Mr. Herbert received information regarding the transaction and the future of Fuller from Mr. Krick and other GATX employees who were in contact with fir. Gates and other members of F A Holding. S.89.

(bv) Mr. Herbert visited Fuller's headquarters on November 18-19, 1986, and he met with Fuller personnel, some of whom had expressed concern over their future with

Fuller and their pension rights with GATX. S.90.

(bw) Mr. Herbert's decision that Fuller employees were ineligible for the 75/80 Points Retirement was based on, among other things, his understanding that F A Holding intended to continue Fuller as an ongoing business. S.91.

(bx) Mr. Herbert believed that prior actions by GATX and the Plan supported his decision. S.92.

(by) Mr. Herbert testified at deposition that the subject of 75/80 point benefits came up during his discussions with Herbert Krueger, GATX Corporation's ERISA counsel for the Fuller sale. Mr. Herbert, although unable to recall the substance of Mr. Krueger's advice, believes that he would have reviewed his conclusion had Mr. Krueger advised him that the Plan would have to award 75/80 point benefits. S.S.39 & Exh.49.

(bz) On October 8, 1985, in response to concerns expressed by Fuller employees regarding their retirement plans, Mr. Gates, then President of Fuller, sent a memorandum to all Fuller employees. S.94. Mr. Gates attached a memorandum from GATX explaining the possible effects of a Fuller sale on benefits under the GATX pension and savings plan. Exh.16.

(ca) On or before December 31, 1986 Mr. Herbert prepared a draft memorandum stating that, because the closing date for the sale of Fuller had been delayed, the employees who had submitted applications would continue to accrue service "as a GATX employee" until the sale was carried out. Mr. Herbert never sent the memorandum. Exh.52.

(cb) On January 13, 1987 Mr. Krueger sent Mr. Herbert a memorandum which addressed two issues: 1) whether Fuller employees would be eligible to receive Plan benefits while

they remained in Fuller's employ and 2) whether Fuller employees would continue to accrue service toward retirement eligibility after the sale. S.120 & Exh.25.

B. **The Decisions of the Representative Plaintiffs**

1. Edwin Kotrosits

(cc) Between 1955 and December 31, 1986, Mr. Kotrosits worked at facilities operated by Fuller, reaching the position of Quality Control Manager at the Fuller Catasauqua plant.
S.2.

(cd) In 1970 Mr. Kotrosits became a participant in the Plan. S.3.

(ce) On or about December 18, 1986 Mr. Kotrosits submitted a pension application form under the actuarially reduced 55/15 option under the Plan. S.4 & Exh.1.

(cf) Although no one affiliated with Fuller or GATX instructed or ordered Mr.

Kotrosits to submit a pension application, he was coerced into submitting his application. Mr. Kotrosits testified at deposition that the prospect of not receiving the medical and life insurance benefits "scared the hell out of" him. S.5, 11.

(cg) Mr. Kotrosits said that he probably would not have retired on or prior to December 31, 1986 if he had been told that Fuller intended to offer the same medical and life insurance benefits that GATC had provided. S.12.

(ch) On December 31, 1986 Mr. Kotrosits retired from his employment at 58.3333 years old, with 31.25 years of accumulated service credit under the Plan. S.13. If the Fuller sale resulted in a plant shutdown or layoff, Mr. Kotrosits was eligible for 75/80 benefits pursuant to § 4.5 of the Plan.

(ci) When Mr. Kotrosits left work on December 31, 1986, no one had informed him whether he would have a job with Fuller after the sale. S.18.

(cj) Shortly before the Fuller sale date, Mr. Kotrosits' plant manager asked him whether he would be willing to continue to work. The plant manager said, "we'll give you a phone call January the 2nd. Stay close to your phone." S.17.

(ck) On January 2, 1987, the next business day on which the Catasauqua plant was open, Mr. Kotrosits received an early morning phone call, prior to 7:00 am., inviting him to return to work. S.14.

(cl) On January 2, 1987, Mr. Kotrosits went back to his employment as a Quality Control Manager at the Fuller Catasauqua plant and has Continued in that position from January 2, 1987 to the present. S.15.

(cm) When Mr. Kotrosits went to work on January 2, 1987, he went back to the same job from which he had retired on December 31, 1986 and continued to work for the same supervisor. S.16.

2. Julius Ruggeri

(cn) Between 1954 and December 31, 1986, Mr. Ruggeri worked at facilities operated by Fuller, reaching the position of Group Leader for Parts Programming in the Numeric Control Department at the Fuller Catasauqua plant. S.20.

(co) On or about December 22, 1986 Mr. Ruggeri submitted a pension application form, applying for retirement under the actuarially reduced 55/15 option in the Plan. S.21 & Exh.2.

(cp) No one affiliated with Fuller, GATX, or any other entity instructed or ordered Mr. Ruggeri to submit a pension application. S.22.

(cq) On December 31, 1986, Mr. Ruggeri retired from his employment. As of that date, Mr. Ruggeri, 56.75 years old, had accumulated 32.3333 years of service credit under the Plan. S.23. If the Fuller sale resulted in a plant shutdown or layoff, Mr. Ruggeri would be eligible for 75/80 benefits pursuant to § 4.5 of the Plan.

(cr) Prior to December 31, 1986, Mr. Ruggeri's plant manager asked him if he would like to work for Fuller after the sale. The plant manager told Mr. Ruggeri that he was too young to retire. The manager stated, "as of now we can't tell you anything. You'll get a telephone call on the second letting you know whether to come to work or not." S.27.

(cs) Mr. Ruggeri left work on December 31, 1986 without knowing whether he would have a job with Fuller after January 1, 1987. S.28.

(ct) On January 2, 1987, the next business day on which the Catasauqua plant was open, Mr. Ruggeri received a phone call before 7:00 a.m. inviting him to return to work. S.24.

(cu) On January 2, 1987 Mr. Ruggeri went back to the same job from which he had retired, Group Leader for Parts Programming at the Fuller Catasauqua plant, and has continued in that position from January 2, 1987 to the present. When Mr. Ruggeri returned to Fuller, he worked for the same supervisor as he had before the Fuller sale. S.25, 26.

3. Marvyn Souders

(cv) From 1955 to the present, Mr. Souders has worked at facilities operated by Fuller, reaching the position of Product Engineer at the Fuller Bethlehem facility. S.30.

(cw) On December 31, 1986 Mr. Souders, 49.75 years old, had accumulated

31.5833 years of service credit under the Plan.

S.31. If the Fuller sale constituted a plant shutdown or layoff under the plan, Mr. Souders would be eligible for 75/80 point benefits.

(cx) Mr. Souders was not eligible for actuarially reduced retirement under the 55/15 option on or before December 31, 1986, because he was not yet 55 years old. S.33.

(cy) As of January 5, 1987, the first business day in 1987 at the Fuller Bethlehem facility, Mr. Souders worked at the same job, under the same supervisor, as he had as of December 31, 1986. S.32.

(cz) Mr. Souders, like Messrs. Kotrosits and Ruggieri, did not know whether Fuller would employ him after the sale of stock. Unlike Kotrosits and Ruggieri, he was told to report to work on January 5, 1987, at which time the company would tell him whether he had a job or not. S.34.

(da) Mr. Souders reported to work at the Fuller Bethlehem headquarters on Monday, January 5, 1987, and continued performing the same duties he had performed prior to December 31, 1986, under the same supervisor. S.80.

(db) Mr. Souders submitted a request for retirement information dated as of October 17, 1986. S.50 & Exh.6.

(dc) Prior to December 31, 1986, Souders received a memorandum (misdated as 12/18/87, probably circulated on or about 12/18/86) addressed to "All Fuller Company Salaried Employees." S.51 & Exh.7.

E. Who Employed the Plaintiffs?

(dd) Prior to the sale, the plaintiffs never received any notification that they were GATX and not Fuller employees. S.46.

(de) All W-2 forms produced by plaintiffs for the years 1986 and earlier

stated that their employer was "Fuller Company." S.47 & Exh.4.

(df) Prior to December 31, 1986, Fuller employees received their payroll checks from a bank account held in the name of GATX. "GATX" and not "Fuller" appeared on the checks and paystubs. S.61.

(dg) Prior to December 31, 1986, service awards given to Fuller employees referenced GATX. S.62.

(dh) During the course of their employment at Fuller, Kotrosits, Souders, and Ruggeri received numerous memoranda and internal correspondence on stationery which referenced GATX but made no reference to Fuller. S.63.

(di) Before December 31, 1986, Messrs. Kotrosits, Ruggeri, and Souders each received a Summary Plan Description. They received a variety of literature regarding the Plan and other employee benefits that

referenced GATX, some of which did not expressly refer to Fuller. S.58 & Exh.11.

(dj) Messrs. Kotrosits, Ruggeri, and Souders each had read through the Plan prior to the Fuller sale. S.67.

(dk) The December, 1986 memorandum received by Kotrosits and Souders was from Elmer Gates and addressed the issue of employee benefits after the sale of Fuller. Among other things, the memorandum described the Employee Benefits available to Fuller employees after the sale. With regard to their pensions, Fuller employees were informed that they would be 100% vested in their accrued GATX pension as of December 31, 1986. Fuller employees would receive that benefit at their Normal or Early (if applicable) Retirement Dates. They would begin accruing service credit for the new Fuller plan on January 1, 1987 and would not receive credit for prior GATX service. Exh. 7.

(dl) Fuller employees will not vest in the new Fuller plan until they have completed 5 years of service for the new Fuller company. Exh.7.

(dm) Prior to the sale of Fuller, Mr. Kotrosits had heard Fuller referred to many times as a subsidiary of GATX. Mr. Kotrosits testified at deposition that when he had heard Fuller referred to as a "subsidiary" of GATX, that meant to him that "our division, the entity Fuller Company" was owned by GATX. S.57.

(dn) On or about May 1, 1984 Mr. Kotrosits received his "GATX Performance Appraisal Form." S.59 & Exh.12.

(do) Prior to December 31, 1986, Mr. Kotrosits received a memorandum (misdated as 12/18/87, probably circulated on or about 12/18/86) addressed to "All Fuller Company Salaried Employees." S.60 & Exh.7.

(dp) Mr. Kotrosits testified at deposition that, as of December 31, 1986, he regarded his employer as "Fuller Company, owned by GATX. I felt I was an employee of GATX." S.56.

(dq) On or about June 1, 1986 Mr. Ruggeri received his "GATX Performance Appraisal Form." S.52 & Exh.8.

(dr) On or about November 17, 1986 Mr. Ruggeri sent a letter to Ken Krick, a GATX executive. S.53 & Exh.9.

(ds) On or about November 24, 1986 Mr. Ruggeri's wife, Mary Ann Ruggeri, sent a letter to Mr. Krick. S.59 & Exh.10.

(dt) Mr. Ruggeri testified at deposition that in 1986, prior to the sale of Fuller, he would have responded in informal conversation that his employer was "Fuller Company." S.55.

F. The Claims

(du) In March, 1987 Ruggeri, Kotrosits, and Souders (by separate letter) submitted letters asserting their eligibility for 75/80 point benefits to James Herbert, the Plan administrator. S.105 & Exh.20.

(dv) On March 30, 1987 Mr. Herbert wrote each of the plaintiffs to inform them that their claims for 75/80 point benefits were denied. S.106 & Exh.21.

(dw) Mr. Herbert based his decision on his understanding that Fuller continued as a going concern after the sale. Specifically, Mr. Herbert relied on the fact that, according to Elmer Gates, president of Fuller before the sale and president and chairman of the board after the sale, Fuller would continue to operate the same facilities with essentially the same employees. Moreover, Mr. Herbert understood that Ruggeri, Kotrosits, and

Souders all continued to work for Fuller. S.107.

(dx) Mr. Herbert also based his decision on his understanding of the Plan's treatment of prior sales of GATX subsidiaries as going concerns. Those subsidiaries were GARD, Marine Transport Lines, Inc. (MTL), and the Richmond terminal. S.108.

(dy) Prior to making his initial decision in November, 1986, Mr. Herbert had consulted with Ronald J. Ciancio, Assistant General Counsel of GATX Corporation, who had concurred in Mr. Herbert's interpretation of the Plan as it applied to the Fuller sale. Mr. Herbert also consulted with the previous Plan Administrator, Mr. Kohler. S.109.

(dz) Mr. Krick did not totally agree with Mr. Herbert's determination regarding the availability of 75/80 point benefits under the Plan. Mr. Krick did not think that 75/80 had

to apply, but he would have preferred that the Plan make those benefits available. S.110.

(ea) On April 30, 1987 Messrs. Ruggeri, Kotrosits, and Souders (by separate letter) appealed Mr. Herbert's determinations to the Plan Benefits Committee. S.111 & Exh.22.

G. **The Actions of the Plan Benefits Committee**

(eb) On June 8, 1987 the Plan Benefits Committee met and affirmed the Plan Administrator's denial of plaintiffs' claims. Messrs. Ciancio, Herbert, and Krueger also attended the meeting. One day prior to the meeting, Mr. Herbert distributed a chronology and copies of certain documents to the committee members. S.112 & Exh.23.

(ec) The GATX Benefits Committee, which had the authority under the GATX Pension Plan to overrule Mr. Herbert's denial of benefits, consisted of the Chairman & CEO of

GATX (James Glasser), the Vice-President and General Counsel of GATX (Paul Heinen), and the Vice President of Human Resources of GATX (Roland Finkelman). S.114 & Exh.23a.

(ed) At the meeting, the Committee heard and approved the reasoning underlying Mr. Herbert's decision. The Committee based their approval on the following factors: 1) GATX sold Fuller as a going concern; 2) Fuller had retained essentially the same employees as had been employed there before the sale; 3) Messrs. Ruggeri, Kotrosits, and Souders all continued to work at Fuller; and 4) the Fuller sale resembled the prior MTL, Richmond Terminal, and GARD transactions (where no 75/80 point benefits had been afforded) and did not resemble the Pollock and GAG Tank Erection Corporation ("TEC") transactions (including facility shutdowns) and the GATC Sharon, Pennsylvania plant shutdown where 75/80 point benefits had been applied for and

granted. Those transactions are described infra. S.113.

(ee) To the best of Mr. Herbert's recollection, neither Mr. Ciancio nor Mr. Krueger participated in any discussions during the June 8, 1987 meeting. S.116.

(ef) Mr. Herbert advised the committee members that denial of 75/80 point retirement to Fuller employees was consistent with the decisions taken in MTL and other situations where the business continued following the sale of each company. S.117.

(eg) Roland I. Finkelman, GATX Corporation Vice President and a member of the Benefits Committee when it reviewed the plaintiffs' claims for 75/80 point benefits, testified at deposition that the plaintiffs' continuing employment at Fuller "was one of the integral parts" of the Committee's decision to deny the plaintiffs' 75/80 point claims. S.S.42.

(eh) hen the Committee made its determination that the Fuller sale did not trigger 75/80 benefits on June 9, 1987, F A Holding had not yet adopted a pension plan for Fuller employees. See Exh.39.

(ei) Prior to plaintiffs' claims, no claims for 75/80 point benefits triggered by the sale of a business had previously been submitted for the Benefits Committee's review. S.S.43.

(ej) On March 14 1986, GATX sent a memo to all holders of the GATX Personnel Policy and Practices Manual notifying them of an amendment to clarify that severance pay was thereafter not available for employees of subsidiary companies that are sold, spun-off or otherwise disposed of by GATX as going concerns, where those employees were offered the opportunity for continued comparable employment. S.S.44 & Exh.51.

B. Plan Treatment of Prior Sales and Cessations of Operations

1. Marine Transport Lines. Inc.

(ek) Prior to March 15, 1983, Marine Transport Lines, Inc. ("MTL") was a wholly-owned subsidiary of GATX Corporation and an affiliated company under the Plan. S.123.

(el) On March 16, 1983 GATX spun off all of the shares of MTL to the shareholders of record of GATX. Management of MTL remained in the hands of the officers who had managed the company prior to the spinoff. S.124.

(em) The distribution of MTL stock was made as a special dividend to GATX shareholders, who received the stock without paying any consideration to GATX. Exh.28.

(en) As of December 31, 1982, all MTL salaried employees were terminated as participants in the Plan, and MTL ceased to be a participating employer under the Plan. As of that date, approximately 175 MTL salaried

employees were participants in the Plan. S.125.

(eo) No employees ceased working at MTL facilities, which remained open and continued operations after the spinoff of stock. S.126.

(ep) As of March 16, 1983, the Plan expected MTL employees to continue their employment with MTL after the spinoff. S.131.

(eq) No MTL employees applied for or received 75/80 point benefits as a result of the March 16, 1983 stock spinoff. S.128.

(er) In the last half of 1982, prior to the spinoff, senior MTL management proposed to five employees that they be laid off pursuant to Section 4.5(b) of the Plan. Section 4.5(b) provides for the award of 75/80 benefits to employees whose retirement is granted based on health or extenuating

circumstances at the sole discretion of the employer. S.129.

(es) Only one MTL employee, Cornelia B. Miller, accepted this proposal and elected to retire as of December, 1982. As a result, MTL laid off only one employee, Cornelia B. Miller, on December 31, 1982. S.130.

(et) Ms. Miller submitted a pension application form and received 75/80 point retirement. S.132 & Exh.29.

(eu) On January 1, 1983 Mr. Kohler signed Cornelia B. Miller's pension application review form, providing for 75/80 benefits. S.134 & Exh.31.

(ev) Mr. Kohler believed that the 75/80 provisions would not apply to MTL because the spinoff of the shares of a wholly-owned subsidiary would not trigger the 75/80 provisions. Exh.81.

2. Pollock Company

(ew) Prior to January 1, 1984, Pollock Company was a subsidiary of GATX and an affiliated company under the Plan. As of that date, approximately 37 Pollock Company salaried employees were participants in the Plan. S.135.

(ex) On or about January 1, 1984 GATX Corporation ceased all operations at its Pollock Company subsidiary. GATX laid off all Pollock Company employees on or about January 1, 1984. The assets of Pollock Company were later sold for scrap.
S.136.

(ey) All Pollock Company Plan participants with the requisite age and service credit who applied for 75/80 point pensions began receiving such pensions upon the approval of their pension applications.
S.137.

(ez) Prior to the sale of Pollock Company's assets, its employees were given the following options: (1) being terminated immediately and receiving severance pay, but no further accrual of service credit, or (2) being placed on layoff status until they attained the requisite age and years of service to qualify for the 75/80 point retirement option. S.138.

(fa) Six Pollock employees received 75/80 point pensions, with their retirement dates as follows: Ladisloff Bondor--plant shutdown--3/1/84; Patsy W. Grieco--plant shutdown--3/25/86; Roland A. Mandoline--layoff--1/1/84; Roger G. Powell--plant shutdown--7/1/84; Chester R. Queen--layoff-1/1/84; Helga F. Smirnow--plant shutdown--3/25/86. S.139.

(fb) Bondor, Grieco, Powell, and Smirnow were permitted to continue to accrue age and service credit toward a 75/80

retirement after Pollock's operations were closed. S.140.

3. GARD Division

(fc) Prior to April 2, 1984, GARD Inc. ("GARD") was both a division and a subsidiary of GATX Corporation. S.141.

(fd) On April 2, 1984 GATX sold, pursuant to an asset purchase agreement, substantially all of the properties and assets of GARD to Chamberlain Manufacturing Corporation. S.142 & Exh. 32.

(fe) Until April, 1984 approximately sixty-nine GARD salaried employees were participants in the Plan. S.143.

(ff) The sale of GARD's assets to Chamberlain did not affect GARD employees working at former CARD facilities after the sale. S.144.

(fg) GARD facilities remained open for business and continued operations after the sale. S.145.

(fh) No GARD employees applied for or received 75/80 point benefits as a result of the sale. S.146.

(fi) In deciding that 75/80 point retirement was not applicable to the sale of GARD, the Plan Administrator relied upon and considered the language of Section 4.5 of the Plan.
S.147.

(fj) Prior to the sale of GARD's assets to Chamberlain Manufacturing, GATX and the Plan Administrator anticipated that GARD employees would continue working at those same GARD facilities after the sale took place.
S.148.

(fk) The following provision of the asset purchase agreement for the GARD transaction provided that Chamberlain would assume the assets and liabilities of the GATX pension plan that related to GARD employees. Under the terms of the agreement, Chamberlain

had to establish a separate plan to cover former GARD employees.

5.11 Employer Arrangements

(a) Seller will cause the GATX Corporation NonContributory Pension Plan for Salaried Employees ("GATX Plan") to transfer and Buyer will assume all the liabilities for pension benefits arising under the GATX Plan with respect to the Division's salaried employees that are transferred to Buyer ("GARD Employees"). Buyer will establish a separate pension plan ("Chamberlain-GARD Plan") to cover GARD Employees, which pension plan will be substantially the same as the Buyer's pension plan ("Chamberlain Plan") subject to the following:

(i) All GARD Employees will be granted service credit under the Chamberlain-GARD Plan for purposes of eligibility, vesting and determining benefits for all Seller service to the same extent as credited for such purposes under the GATX Plan.

(ii) Benefits under the Chamberlain-GARD Plan

> will in no event be less than, with respect to each GARD Employee, such GARD Employee's accrued benefit under the GATX Plan as of the date of closing ("Closing Date")....

Exh.32, Section 5.11.

4. GATX Tank Erection Corporation

(fl) Prior to June 28, 1984, GATX Tank Erection Corporation ("TEC"), an affiliated company under the Plan, was a wholly-owned subsidiary of GATC and a second-tier subsidiary of GATX Corporation. TEC operated facilities in Birmingham, Alabama; Houston, Texas; East Chicago, Indiana; and Orem, Utah.

S.149.

(fm) On June 28, 1984 GATX sold certain assets of TEC to Brown-Minneapolis Tank & Fabricating Co. ("Brown-Minneapolis") pursuant to an asset purchase agreement.

S.150 & Exh.33.

(fn) Until June 28, 1984, of the approximately 135 TEC employees, 97 salaried employees were participants in the Plan. S.151.

(fo) As required by Section 6.2 of the asset purchase agreement, TEC terminated or laid off all employees at its Birmingham, Houston, East Chicago, and Orem facilities on or before June 28, 1984. On or about June 28, 1984, TEC ceased production and substantially all of its activities at these facilities. The only TEC facility to reopen was the Birmingham facility, where Brown-Minneapolis started up operations again approximately three-six months after the sale. S.152, 153, Exh.33.

(fp) Brown-Minneapolis advised GATX that it was considering hiring some former TEC employees. Neither GATX nor TEC nor the Plan, however, received written notice from Brown-Minneapolis that it intended to hire any

former TEC employees. Brown-Minneapolis had made no commitment to GATX to hire any TEC employee at the time of the asset sale. S.154.

(fq) GATX retained an outplacement firm, Eastman & Borne Associates, to assist former TEC employees in obtaining new employment. S.155.

(fr) The Plan processed applications by TEC employees with qualifying age and service for 75/80 point benefits. S.156.

(fs) As far as the Plan is aware, Brown-Minneapolis subsequently rehired very few former TEC employees over a period of several months following the sale. S.157.

(ft) Samuel Kohler, then Plan Administrator, regarded those TEC employees who obtained employment at Brown-Minneapolis as having obtained entirely new employment, rather than continuing employment with TEC. S.158.

(fu) At the time the Plan decided to permit TEC employees who qualified to elect a 75/80 point retirement option, GATX and TEC officers (i.e., Mr. Finkelman and Mr. Krick) knew that Brown-Minneapolis was considering hiring some TEC employees. S.159.

(fv) On June 21, 1984 Mr. Krick sent Mr. Finkelman a ° memorandum listing TEC employees whom Brown-Minneapolis wished to retain. S.160 & Exh.34.

(fw) The following TEC employees received benefits pursuant to the 75/80 retirement option, under the "plant shutdown" category: Billy J. Daniel, Gene L. Deason, Charles S. Hanley, Jr., Edwin J. Lodygowski, Charles C. Miller, William H. Reed, Robert C. Rogers, McBurnett Rutland, Alphonsas Snarskis, Evart J. Underhill, and Marvin C. Woeltje. S.163.

(fx) Of the TEC employees who received benefits pursuant to the 75/80

retirement option, Brown-Minneapolis hired two individuals, Gene L. Deason and Charles C. Miller, and offered a third, Edwin J. Lodygowski, a position which he did not accept. S.164.

(fy) Gene L. Deason's and Charles C. Miller's effective retirement date from TEC was July 1, 1984. Edwin Lodygowski's effective retirement date from TEC was August 1, 1984. S.165.

(fz) Eugene Ruark was a TEC employee who, as of June 28, 1984, did not have sufficient age and years of service to qualify for 75/80 point retirement. S.166.

(ga) TEC management initially made the decision to place Eugene Ruark on layoff status until December 1, 1984, at which point he would have qualified, in terms of age and years of service, for a 75/80 point pension retirement. S.167.

(gb) Mr. Krueger revoked the decision to place Eugene Ruark on layoff status when it was discovered that Mr. Ruark had been involved in some alleged thefts of company assets.
S.168.

5. Richmond

(gc) GATX Tank Storage Terminals Corporation is a wholly-owned subsidiary of GATX Terminals Corporation and an affiliated company under the Plan. S.169.

(gd) Prior to September 20, 1984, GATX Tank Storage Terminals Corporation operated tank and warehouse storage facilities in Richmond, California ("Richmond Terminal"). S.170.

(ge) On September 20, 1984 GATX Tank Storage Terminals Corporation sold Richmond Terminal to Unitank Terminal Service.
S.171.

(gf) Until that date, approximately nine Richmond facility salaried employees were participants in the Plan.
S.172.

(gg) No employees ceased working at the Richmond Terminal on September 20, 1984. The Plan Administrator understood that Richmond Terminal employees would continue to work at the facility after the sale. S.173.

(gh) Richmond Terminal remained open°for business and continued its operations immediately following the sale.
S.174.

(gi) The asset purchase agreement for the Richmond Terminal transaction provided that

> [t)o the extent permitted by law, Buyer will recognize and allow credit for each non-bargaining unit Transferred Employee's years of service with GATX for purposes of determining each non-bargaining unit Transferred Employee's

> eligibility to participate in, and benefits under, any of Buyer's employee benefit plans . . .

Exh.87.

(gj) On or about September 10, 1984, two Richmond Terminal employees with sufficient age and service, Charles Jones and Frank Tetzschner, applied for 75/80 point benefits as a result of the sale. They were the only Richmond employees who applied for 75/80 point benefits. S.175.

(gk) The Plan Administrator determined that Jones and Tetzschner were not entitled to 75/80 point pensions. The employees did not appeal the Administrator's determination. S.176.

(gl) In a letter dated March 28, 1985, to Norman Leonard, counsel for Mr. Jones and Mr. Tetzschner, Mr. Herbert explained that "the Richmond Terminal was not permanently shutdown but purchased by Unitank and continued to operate," and that, since Unitank

employed Jones and Tetzschner, they were never placed on layoff. Exh.51.

6. GATC

(gm) GATC is an affiliated company under the Plan.
S.177.

(gn) Mr. Herbert testified at deposition that the GATC Sharon, Pennsylvania plant was closed over a period of time. As the plant discontinued its operations, no work was available, and the Sharon plant employees qualified for 75/80 retirement. S.178.

I. **Plan Treatment of Other Employees**

(go) Prior to 1980, Robert Soha was the Controller at Fuller's Catasauqua Plant. At some point it was determined that Mr. Soha was not performing adequately, so he was offered a transfer to corporate headquarters to a lower job position. Management also gave Mr. Soha the option of retiring under the 75/80 Point Retirement Option, effective

June 1, 1982. Mr. Soha elected to take the 75/80 Point Retirement Option. Mr. Herman testified at deposition that Mr. Soha retired under the "extenuating circumstances" provision of the 75/80 Point Retirement Option under the Plan. The Plan records indicate that Mr. Soha was terminated as a result of a layoff. S.S.51 & Exh.58.

(gp) Roger Flores was an employee who worked at Fuller headquarters. Mr. Flores was on layoff for two years and then was terminated. At that point, November 1, 1983, he retired under the 75/80 Point Retirement Option. S.S.52.

(gq) Virgil B. Spence was a GATC employee who received a 75/80 Retirement Option in conjunction with the termination of his employment with GATC. S.S.53 & Exh.59.

(gr) Donald E. Laub was a GATX employee who worked in the custom fabrication division at East Chicago, Indiana. Mr. Laub

retired on January 1, 1974, and was granted a 75/80 retirement benefit under the "mutually satisfactory conditions" of Section 2.3 of the Plan in effect as of that date. S.S.60 & Exhs.47 & 66.

(gs) K. H. Chang was an MTL employee who retired in 1974 and was granted a 75/80 retirement option under the "mutually satisfactory conditions" provisions of Section 2.3 of the Plan in effect as of that date. S.S.61 & Exhs.47 & 67.

(gt) Doris T. Anderson was an employee who was granted a 75/80 Point retirement option and who retired on January 1, 1966. Mrs. Anderson was granted the 75/80 option under Section 2.3 of the Plan in effect as of that date. S.S.57 & Exhs.47 & 63.

(gu) Felix Szczudlak was an employee of General American Transportation Corporation who was granted a 75/80 retirement benefit under the "mutually satisfactory conditions"

provision of Section 2.3 of the Plan in effect as of the date he retired, August 1, 1967. S.S.64 & Exhs.47, 71, & 72.

(gv) Helen A. Lindquist was an employee at GATX's Chicago, Illinois office who was granted a 75/80 Retirement Option under Section 4.5(b) of the Plan. S.S.54 & Exh.60.

(gw) Exhibit 61 is a memo dated January 24, 1977 from L. J. Conti to J. J. Glasser (then the President of GATX Corporation) concerning a request to permit four salaried employees at the Carteret, New Jersey facility to be granted a 75/80 retirement option. Of the four individuals referenced on that memo, Stanley Masluch [sic (Masluck)] retired on April 1, 1977, with a 75/80 pension, under the "company discretion" provision of Section 4.5(b) of the Plan. Edward J. Riley retired on March 1, 1978 and received at 75/80 retirement benefit, under

"company discretion" provision. F. Fitzpatrick retired on April 1, 1977, received a 75/80 retirement benefit, and retired under the company discretion provision.
E. O'Donnell was not a salaried employee or a participant in the Plan. S.S.55 & Exh.61.

(gx) Mary Ann Duggan was a GATX employee who retired in 1985 and who was granted a 75/80 pension effective January 1, 1986 under the "company discretion" provision of Section 4.5(b) of the Plan. S.S.56 & Exh.62.

(gy) J. W. Allegrette was an employee who was granted a 75/80 retirement option under the "company discretion" provision of Section 4.5(b) of the Plan. S.S. 58 & Exh.64.

(gz) Charles R. Loy was a GATX employee who, in late 1984, was granted a 75/80 retirement under Section 4.5(b) of the Plan. S.S.59 & Exh.65.

(ha) Joyce Bartus was an employee of American Steamship Company, which was once a subsidiary of GATX Corporation. Mrs. Bartus retired in March, 1979, and was granted a 75/80 pension under the company discretion provision of Section 4.5(b) of the Plan. S.S.62 & Exh.68.

(hb) Theodore Wang was an employee of Marine Purchasing Corporation who retired in 1977, receiving a 75/80 pension benefit under the "company discretion" provision of Section 4.5(b) of the Plan. S.S.63 & Exhs.69 & 70.

(hc) Harry M. Purvies was an employee who retired on August 1, 1977, and received a 75/80 retirement option under the "company discretion" provision of Section 4.5(b) of the Plan. S.S.65 & Exh.73.

(hd) Burton G. Ochampaugh was a GATX employee, who also served for some period of time as Plan Administrator, who retired

effective July 1, 1980. In conjunction with the termination of his employment, Mr. Ochampugh received a 75/80 retirement under "company discretion" provision of Section 4.5(b) of the Plan. S.S.66 & Exh.74.

(he) Harry Nelson was a Fuller employee who retired effective January 1, 1981 and who was granted a 75/80 retirement benefit under the "company discretion" provision of Section 4.5(b) of the Plan. S.S.67 & Exh.75.

(hf) Donald Pazdur was a GATX employee whose employment with GATX was terminated on February 13, 1981. In conjunction with the termination of his employment, Mr. Pazdur was granted a 75/80 retirement benefit. S.S.68 & Exh.76.

J. **Miscellaneous Findings**

(hg) Mr. Souders represents the subclass of Fuller employees who, as of December 31, 1986, qualified for 75/80 points

retirement but did not qualify for the 55/15 benefit ("Souders subclass").

(hh) Messrs. Kotrosits and Ruggeri represent the subclass of Fuller employees who were coerced into filing for 55/15 early retirement but had sufficient age and years of service to qualify for the 75/80 benefit ("Ruggeri subclass").

(hi) At the time they retired, Messrs. Kotrosits and Ruggeri were close to qualifying for the enhanced 90 point retirement benefit. Mr. Kotrosits' combined age and service credit totalled 89.5833; Mr. Ruggeri's totalled 89.0933. If GATX had not sold Fuller, and these men had continued to work for Fuller, they would have been eligible for 90 point subsidized early retirement in a short period of time.

(hj) The MTL transaction differed from the Fuller sale in that it was a spinoff of the shares of the GATX subsidiary's stock

to GATX stockholders. Unlike the Fuller transaction, the GATX shareholders received the MTL stock as a special dividend. GATX received no consideration in return for the shares.

(hk) The GARD asset sale differed from the Fuller sale in that the GARD asset purchase agreement provided for the transfer of the assets and liabilities of the Plan that related to GARD employees' pensions to the purchasing corporation. See supra page 32. The agreement provided that the GARD employees pension plan would continue as before with no effect on the benefits received by those employees.

(hl) With respect to the TEC transaction, the Plan awarded 75/80 pensions to employees laid off pursuant to Section 6.2 of the asset purchase agreement even if those employees received job offers from Brown-Minneapolis, the buying corporation.

(hm) The Richmond Terminal transaction differed from the Fuller sale, because Richmond Terminal's buyer recognized and credited the employees' GATX service credit for purposes of its own plan. Therefore, the employees' pension rights continued unaffected by the sale.

(hn) The draft stock purchase agreement for the Fuller sale, prepared by GATX, provided that the Buyer would assume the assets and liabilities of the GATX plan that related to Fuller employees. The final purchase agreement provided the sale would result in the termination of the Fuller employees' participation in the Plan and imposed no obligation on the buyer to fund a plan for former Fuller employees.

(ho) The Plan Administrator made his determination that 75/80 benefits did not apply after the terms of the stock sale had been finalized. If the above-referenced

change in language had required the award of 75/80 benefits, GATX could not have negotiated for a purchase price to reflect that change.

(hp) The GATX-appointed trustees were operating under a conflict of interest when they denied 75/80 benefits to the plaintiff employees.

DISCUSSION

1. Contentions of the Plaintiffs

The plaintiffs[11] challenge the defendant's denial of their applications for subsidized early retirement benefits payable as a result of the Fuller sale.[12] Specifically, the plaintiffs submit that the Plan Administrator and members of the GATX Benefits Committee violated ERISA in denying the plaintiffs' applications for 75/80

[11]Mr. Ruggeri represents the class of Fuller salaried employees who applied for 75/80 point retirement before December 31, 1986, but received only the actuarially reduced 55/15 benefit. Mr. souders represents the class of Fuller salaried employees who requested 75/80 retirement prior to December 31, 1986 and who did not qualify for the actuarially reduced 55/15 benefit. Members of both subclasses had sufficient age and service credit to qualify for a 75/80 point pension.

Originally, Mr. Kotrosits sought a 90 point pension under the terms of the Plan. See Complaint, Count V. He has apparently abandoned that claim and now seeks 75/80 benefits as a member of the Ruggeri subclass.

[12]Section 502(a)(1)(b) of ERISA, 29 U.S.C. § 1132(a)(1)(b), provides that participants in pension plans may bring civil suits to enforce ERISA.

retirement benefits under Section 4.5, which provides for subsidized benefits when employment is terminated either at the discretion of the company or due to a layoff or plant shutdown. In support of their argument, the plaintiffs note that, as of closing time on December 31, 1986, they were unemployed.[13]

The plaintiffs contend that this court must review the benefit denial de novo because the Plan does not grant the trustees discretionary authority to construe the terms

[13]The plaintiffs proceed on four theories: first, that the Ruggeri and Souders subclasses ceased being GATX employees as of December 31, 1986 and, therefore, were laid off; second, that the December 31, 1986 sale resulted in the involuntary termination, that is layoff, of the Ruggeri and Souders subclasses; third, that the threat of loss of medical and life insurance benefits forced members of the Ruggeri subclass to retire, resulting in an effective layoff; and fourth, that the one to two day layoff of both the Ruggeri and Souders subclasses manifests a clear intent to reduce forces at Fuller Company in conjunction with the stock sale. Plaintiffs' Refiled Trial Memorandum at 19 - 20.

"layoff" or "plant shutdown." Plaintiffs' Supplemental Trial Memorandum ("P. Supp. Tr. Mem.") at 2. Alternatively, the plaintiffs argue that the Plan cannot enjoy the benefit of the more lenient abuse of discretion standard, because the Summary Plan Description fails to inform employees that review of the Administrator's decision will be limited in such a way. Plaintiffs' Reply to Defendant's Supplemental Trial Memorandum at 6. Finally, the plaintiffs submit that this court should grant them the requested relief even if it applies the abuse of discretion standard.

B. **Contentions of the Defendant**

The defendant argues that Section 4.5 of the Plan agreement unambiguously precludes the award of a 75/80 pension under the circumstances of the Fuller sale. The defendant relies on the fact that, after the sale, Fuller continued as a going concern. On January 2, 1987 the new entity offered

employment to all representative plaintiffs. Defendant's Trial Memorandum ("D. Tr. Mem.") at 10. Moreover, old Fuller employees, once rehired post sale, were covered by a plan adopted by the new Fuller company. D. Tr. Mem. at 11, 5.51, Exh.7 at 1.

The defendant avers that the Plan Administrator, Mr. Herbert, and the GATX Benefits Committee ("Committee") did not base the decision to deny 75/80 benefits on purely financial considerations. The trustees understood that Fuller was sold as an ongoing business. Additionally, in Mr. Herbert's view, the Plan had not treated prior sales of control as triggering 75/80 benefits. D. Tr. Mem. at 21-28. Mr. Herbert also consulted with the Plan's attorneys, the prior Plan administrator, and the Personnel Manager. All of these individuals concurred in the conclusion that the Fuller sale did not trigger the benefits in Section 4.5. D. Tr.

Mem. at 14-15. According to the defendant, the Plan fiduciaries reasonably based their decisions on all of the above factors. For these reasons, the defendant urges that this court affirm its denial of benefits to the plaintiff class members.

The defendant also maintains that Section 8.3 of the Plan precludes de novo review of the Plan Administrator's or the Committee's decision. Defendant's Supplemental Trial Memorandum ("D. Supp. Tr. Mem.") at 3. Section 8.3 states, in relevant part,

> The Committee on behalf of the Participants and all other Beneficiaries of the Plan and Trust shall enforce the Plan in accordance with the terms of the Plan and the Trust Agreement and shall have all powers necessary to accomplish that purpose, including but not by way of limitation, the following:. . . .
>
> (b) To construe The Plan and Trust Agreement;

> (c) To determine all questions arising in its administration, including those relating to the eligibility of persons to become Participants; the rights of Participants and their Beneficiaries; and its decision thereon shall be final and binding upon all persons hereunder. . . .

Plan, Article 8.

In analyzing the parties' contentions, this court must turn first to the question of standard of review.

C. **Analysis of the Parties' Contentions**

1. Standard of Review

The Supreme Court enunciated the standard for reviewing a denial of benefits challenged under § 1132(a)(1)(B) of ERISA in Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989). Firestone rejected the wholesale importation of the arbitrary and capricious standard developed in pension cases

arising under the Labor Management and Relations Act, 29 U.S.C.A. § 186(c) ("LMRA") into ERISA. 489 U.S. at 109.[14]

The Court counselled that because principles of trust law govern federal court review of benefit decisions by plan trustees, "a denial of benefits challenged under § 1132(a)(1)(B) is to be reviewed under a de novo standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the

[14]Under the LMRA, unions and employers may set up pension plans jointly "for the sole and exclusive benefit of the employees. . . ." 29 U.S.C. § 186(c). Because the LMRA does not provide for judicial review of determinations by plan trustees, federal courts adopted the arbitrary and capricious standard as a means of asserting jurisdiction over suits alleging that the trustees had not complied with § 186(c). Firestone, 489 U.S. at 109 (citing Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 (7th Cir. 1987)). Moreover, LMRA plans are administered by representatives of the employees as well as the employer. Deferential review is therefore more appropriate for LMRA plans than for ERISA plans administered by the employer only.

plan." 489 U.S. at 115. If the plan document grants the trustee discretionary authority, courts must review fiduciary decisions for abuse of discretion. 489 U.S. at 111; see also Stoetzner v. United States Steel, 897 F.2d 115, 119 & n.5 (3d Cir. 1990); Brown v. Blue Cross and Blue Shield. Inc., 898 F.2d 1556, 1558 n.1 (11th Cir. 1990), cert. denied, 111 S. Ct. 712 (1991); De Nobel v. Vitro Corp., 885 F.2d 1180, 1187 - 88 (4th Cir. 1989); Batchelor v. International Bhd. of Elec. Workers Local 861 Pension and Retirement Fund, 877 F.2d 441, 442 (5th Cir. 1989).

With regard to the appropriate standard of review, this court must agree with the defendant. Because section 8.3 invests in the trustees discretion to interpret the Plan, the Committee's decision must stand absent an abuse of discretion. See Stoetzner, 897 F.2d

at 119 & n.5 (arbitrary and capricious[15] standard applies when plan provides that "decisions of the [trustee] shall be final and

[15]Some courts equate the "arbitrary and capricious" and "abuse of discretion" standards, and others distinguish them. Compare Stoetzner, 897 F.2d at 119 ("the arbitrary and capricious standard (applies] because the plan contains provisions which give the administrator discretion in making eligibility determinations") and Newell v. Prudential Ins. Co., 904 F.2d 644, 650 (11th Cir. 1990) (stating that Firestone mandates application of the arbitrary and capricious standard when plan instrument gives the trustee discretion) and Johnson v. Enron Corp., 906 F.2d 1234, 1238 (8th Cir. 1990) (same) with Jordan v. Cameron Iron Works, Inc., 900 F.2d 53, 56 n.1 (5th Cir.), cert. denied, 111 S.Ct. 344 (1990) (proper standard under Firestone is abuse of discretion) and De Nobel, 885 F.2d at 1187 (Firestone mandated total abandonment of arbitrary and capricious standard). See also Rizzo v. Caterpillar, Inc., 914 F.2d 1003, 1008 (7th Cir. 1990) (arbitrary and capricious, not abuse of discretion, is applicable standard of review when trustee given discretionary authority).

The Firestone Court was concerned less with the distinction between "arbitrary and capricious" and "abuse of discretion" than with the distinction between de novo and deferential review. Following our Court of Appeals in Stoetzner, this court will use both terms to refer to judicial review which is largely deferential.

conclusive as to all questions of interpretation and application of these Pension Rules and as to all other matters arising in the administration thereof"); see also Foster McGraw Hosp. v. Building Material Chauffeurs Welfare Fund Local 786, Nos. 90-2014, 90-2098, 1991 U.S. App. Lexis 2057, *7 (7th Cir. Feb. 12, 1991) (deferential review required when trustees have power to determine all questions arising in administration, interpretation and application of plan); Morales v. Pan Am. Life Ins. Co., 914 F.2d 83, 88 (5th Cir. 1990) (abuse of discretion standard applies when plan document grants discretion to construe the Plan, determine eligibility, authorize disbursements, compute benefits and perform such other duties as required); Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990) (abuse of discretion standard applies when trustees have power "to construe and interpret the plan") Batchelor,

877 F.2d at 443 (5th Cir. 1989) (abuse of discretion standard applies when plan provides that the Trustees "have full and exclusive authority to determine all questions of coverage and eligibility [and) full power to construe the provisions of this Agreement, [and) the terms used herein, [and to] interpret the Plan and . . . determine all questions arising in the administration, interpretation and application of the Plan"); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 31, 39 (11th Cir. 1989) (arbitrary and capricious standard applies when the plan confers "full and exclusive authority to determine all questions of coverage and eligibility and full power to construe the provisions of [the] Trust" on the trustees); Ferrara v. Allentown Physician Anesthesia Assoc., Inc., 711 F. Supp. 206, 209 (E.D. Pa. 1989) (arbitrary and capricious standard applies when the plans provide that

the administrator "shall administer the Plan in accordance with its terms and shall have the power to determine all questions arising in connection with the administration, interpretation, and application of the Plan").

This court's inquiry does not end, however, merely because the Plan document grants the trustees discretion. Were that the case, a plan sponsor would be able to eliminate all protection of pension rights simply by including a clause in the plan document granting discretion to sponsor-appointed trustees. Such a limited inquiry would undermine ERISA, legislation aimed primarily at the protection of pension rights. Cf. Firestone, 489 U.S. at 113-14 (rejecting arbitrary and capricious standard because it would "require [the Court] to impose a standard of review that would afford less protection to employees and their

beneficiaries than they enjoyed before ERISA was enacted").

Recognizing the possibility of administrative bias on the part of sponsor-appointed trustees, the Firestone court established a standard of review that would take any such bias into account. Specifically, the Court stated that "if a benefit plan gives discretion to an administrator or fiduciary who is operating under a conflict of interest, that conflict must be weighed as a 'facto[r] in determining whether there is an abuse of discretion.'" 489 U.S. at 115 (citing Restatement (Second) of Trusts § 187, comment d (1959)). Thus, any court reviewing an ERISA trustee's decision must determine whether the trustees had a conflict of interest when they made a benefits determination.

2. Identifying the Conflict of Interest

The Firestone Court "prescribed rules for judicial review of ERISA benefit denials which effectively supplanted [earlier approaches] - but without rejecting all the concepts of review embodied in those approaches." De Nobel, 885 F.2d at 1185. The Court's instruction with regard to conflict of interest simply mandates the continuation of pre-Firestone inquiries into administrative bias. See De Nobel, 885 F.2d at 1184 (courts, prior to Firestone, took administrative bias into account without abandoning arbitrary and capricious formulation). To the extent that courts analyzed administrative bias in applying the arbitrary and capricious standard of review, pre-Firestone cases can offer guidance for the determination of what constitutes a conflict of interest for the sponsor-appointed[16] trustee of a plan.

[16]The fact that an agent, employee, or representative of the plan sponsor has discretionary authority to determine benefits

Although, in theory, review for arbitrary and capricious behavior required approval of any reasonable interpretation of

does not per se establish an impermissible conflict of interest. ERISA allows the appointment of representatives of a party in interest to administer pension plans. 29 U.S.C. § 1108(c) (3) ("[n]othing in section 1106 of this title [describing prohibited transactions involving impermissible conflicts of interest] shall be construed to prohibit any fiduciary from . . . serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest."); see also Newell v. Prudential Ins. Co., 904 F.2d 644, 649 (11th Cir. 1990). However, under certain circumstances, trustees appointed by an interested party are operating under a serious conflict of interest.

The Third Circuit Court of Appeals has recognized in dictum that, under certain circumstances, representatives of a plan sponsor serving as fiduciaries may face a conflict of interest. In rejecting the argument that plan fiduciaries may never consult the employer's in-house counsel in making benefits decisions, the court noted that specific circumstances "might establish some reason why these particular fiduciaries should not be allowed to make decisions" as envisaged by the plan. Ashenbaugh v. Crucible, Inc. 1975 Salaried Retirement Plan, 854 F.2d 1516, 1531 n.10 (3d Cir. 1988), cert. denied, 109 S. Ct. 3155 (1989) (emphasis supplied). The plaintiffs in Ashenbaugh made no showing of special circumstances.

the plan, in practice most courts took a less deferential approach when there was a probability of administrative bias. Compare Shiffler v. Equitable Life Assur. Soc'y, 838 F.2d 78, 83 (3d Cir. 1988) (decision to deny benefits reviewed for clear error or irrationality) and Teeter v. Supplemental Pension Plan of Consolidated Rail Corp., 705 F. Supp. 1089, 1095 (E.D. Pa. 1989) (when no unusual circumstances present, arbitrary and capricious standard requires review for clear error or irrationality) with Van Boxel v. Journal Co. Employees' Pension Trust, 836 F.2d 1048, 1052 - 53 (7th Cir. 1987) (Posner, J.) (because arbitrary and capricious standard is a range and not a point, it makes necessary adjustments for possible bias) (citing cases) and Dockray v. Phelps Dodge Corp., 801 F.2d 1149, 1152 (9th Cir. 1986) (citing Jung v. FMC Corp., 755 F.2d 708, 711-12 (9th Cir. 1985)) (where there is serious conflict between

interests of employer and fund beneficiaries, less deference afforded to employer-appointed administrator of employer-administered fund).

In employing a deferential standard of review, the federal judiciary recognizes that trustees are often called on to balance the competing interests of different beneficiaries. As stated in De Nobel,

> [f]iduciaries are obligated to act not only in the best interests of beneficiaries, but with due regard for the preservation of trust assets. Adverse benefits determinations may well have saved considerable sums, but that may simply reflect that the trustees, bearing in mind the interests of all participants and beneficiaries, 29 U.S.C. § 1104(a)(1), made a considered decision to preserve the corpus of the trust, rather than grant a doubtful claim. This the statute affirmatively contemplates; and standing alone it clearly suggests no "presumptive bias."

885 F.2d at 1191; see also Shiffler, 838 F.2d at 83; Geib v. New York State Teamsters Conference Pension and Retirement Fund, 758 F.2d 973, 978 (3d Cir. 1985) (trustees given broad discretion to act to conserve assets for future beneficiaries); Edwards v. Wilkes-Barre Pub. Co. Pension Trust, 757 F.2d 52, 56 (3d Cir.), cert. denied, 474 U.S. 843 (1985) (trustees must necessarily balance the interests of different beneficiaries); Morse v. Stanley, 732 F.2d 1139, 1145 (2d Cir. 1984) (trustee must balance interests of present and future beneficiaries); Johnson, Judicial Review of ERISA Plan Administration Under the Arbitrary and Capricious Standard of Review, 10 Indus. Rel. L. J. 400, 406 (1988) (because fiduciary owes duty owed to present and future beneficiaries, duty can cut toward either granting or denying benefits).

Moreover, because employees will accept lower wages in return for secure, well-

defined pension rights, plan sponsors have incentives to avoid the assignment of lower values to benefits. Van Boxel, 836 F.2d at 1051 ("the less an employee's pension rights are worth, the higher are the wages that he will demand"); Fischel & Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, 55 U. Chi. L. Rev. 1105, 1117 (1988) (citing R. Ehrenberg & R. Smith, Modern Labor Economics: Theory and Public Policy 394-406 (3d ed. 1988)) ("Employees pay for pension benefits in the form of lower wages"); cf. Bruch v. Firestone Tire and Rubber Co., 828 F.2d 134, 145 (3d Cir. 1987), rev'd on other grounds, Firestone, supra (citing Inland Steel Co. v. N.L.R.B.1 170 F.2d 247, 253 (7th Cir. 1948)) (pension as much a part of employee's wages as money paid at the time of rendition of services).[17]

[17]The opinion in Bruch was reversed in part by the Firestone opinion. The Bruch court held that the existence of a conflict of

Additionally, bad faith pension decisions can affect employee morale. Thus, "the impact on the company's welfare of granting or denying an individual application for a pension will usually be too slight to compromise the impartiality of the trustees, even if all are appointed by the company." Van Boxel, 836 F.2d at 1051. However, "if the denial of an application is on grounds disqualifying a Vast number of applicants, or if the company is not interested in the long run because it is about to go out of business, any presumption of neutrality [of employer-

interest justified de novo review of an administrator's decision. 828 F.2d at 145. The Supreme Court reversed, holding that the motivations of plan administrators and fiduciaries are not relevant to the determination of the proper standard of review. 489 U.S. at 115. See Petrilli v. Drechsel, 910 F.2d 1441, 1445 (7th Cir. 1990) (Supreme Court upheld determination that de novo review applied on different grounds). The Firestone Court did not rule that the Court of Appeals' guidance for determining when a conflict of interest exists was incorrect.

appointed trustees] may fail." Van Boxel, 836 F.2d at 1051. Having defined conflict of interest generally, this court will now examine the position of the GATX trustees in particular.

3. Conflict of Interest and the GATX Trustees

If the Plan had allowed the 75/89 benefits, GATX would have faced increased liabilities as Plan sponsor.[18] Defined benefit plans such as the GATX Plan require the sponsor to pay a retirement pension based on certain variables, and the sponsor remains liable to pay the benefits if the fund turns up short. In other words, the sponsor guarantees the actuarial soundness of the plan. Fischel & Langbein, 55 U. Chi. L. Rev. at 1112-13. Thus, at the time of the benefits decision, GATX had a contractual obligation

[18]Although Fuller employed the plaintiffs, GATX (Fuller's parent) sponsored the Plan and guaranteed its actuarial soundness.

that it had to honor, and "the wealthier the fund is, the less likely is the company to be called on to ante up pension money out of its own pocket." Van Boxel, 836 F.2d at 1050-51.

Mr. Herbert, the Plan Administrator who made the initial determination that the plaintiffs did not qualify for subsidized early retirement, is Director of Employee Benefits for GATX. The Committee, which approved pro forma the Administrator's decision, consists entirely of GATX officers. See Finding of Fact 131 (Committee consists of Chairman and CEO of GATX, Vice President and General Counsel of GATX and Vice President of Human Resources of GATX). If the interests of GATX clashed with the interests of the plaintiffs, the Plan fiduciaries were operating under a conflict of interest. Davis v. Kentucky Fin. Cos. Retirement Plan, 887 F.2d 689, 694 (6th Cir. 1989), cert. denied, 110 S. Ct. 1924 (1990); Cf. Struble v. New

Jersey Brewery Employees Welfare Trust Fund, 732 F.2d 325, 333-34 (3d Cir. 1984) (where gravamen of complaint is not that trustees have incorrectly balanced valid interests, but rather that they have sacrificed valid interests to advance the interests of non-beneficiaries, less deferential review appropriate).

Although the expense imposed on the sponsor of a fully funded plan will not usually create cause for searching judicial review, see De Nobel, 855 F.2d at 1191, the potential for a conflict of interest unquestionably existed under the unique circumstances of this case. Because GATX had just sold Fuller, it had no incentive to consider the effect of the benefits decision on the morale and productivity of Fuller employees. Moreover, the fact that the denial affected a large number of employees and resulted in estimated savings of at least two

million dollars for the Plan undermines the rationale for deferential review. The larger the expenditure, the greater the possibility that the sponsor will eventually have to replenish the Plan's funds. See Van Boxel, 836 F.2d at 1050-51.

Furthermore, the inferences of bad faith apparent here mandate less deferential review. See Bruch, 828 F.2d at 140 (citing Dennard v. Richards Group. Inc., 681 F.2d 306, 314 (5th Cir. 1982)). GATX instructed its managerial staff not to tell Fuller employees whether they would have jobs after the sale. In spite of its concerted effort to ensure that employees would make their retirement decisions without full information, the Plan now asserts that the employees simply "[made] their economic decisions." Transcript of December 16, 1988 hearing at 46. The Plan trustees also coerced the plaintiffs into accepting actuarially reduced benefits by

threatening the loss of lifetime medical and

life insurance benefits.[19] This is not good

[19]The defendant attempts to justify its actions with regard to the welfare benefits by asserting that, because the insurance benefits were unprotected, the Plan could have revoked them at any time. D. Tr. Mem. at 5, n.5; D. Supp. Trial Mem. at 13, n.14. The defendant is correct that welfare benefits "are exempt from the more stringent ERISA requirements." Reichelt v. Emhart Corp., 921 F.2d 425, 429 (2d Cir. 1990) (citing Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045 (7th Cir.), cert. denied, 481 U.S. 988 (1981)). See 29 U.S.C. § 1051(1); Howe v. Varity Corp., 896 F.2d 1107, 1109 (8th Cir. 1990); see also McNeil, The Failure of Free Contract in the Context of Employer-Sponsored Retiree Welfare Benefits: Moving Towards a Solution, 25 Harv. J. on Legis. 213 (1988) (discussion of the problem of unprotected retiree benefits and proposal for legislative solution). Although ERISA does not regulate the vesting of retiree insurance, the Plan's use of those benefits to pressure the plaintiffs into accepting actuarially reduced benefits contributes to this court's determination that the Plan acted in bad faith. It is also noted that the Stock Purchase Agreement required F A Holding to cause Fuller to reimburse GATX for up to $600,000 off the costs of retiree benefits granted to Fuller salaried employees who retired as a result of the Fuller sale.

Obviously, the coercion apparent here affected only the Ruggeri subclass, the plaintiffs who were denied 75/80 benefits but received the actuarially reduced 55/15 pension. The bad faith apparent in the Plan's dealings with the Ruggeri subclass plaintiffs, however, also taints the denial of 75/80

faith behavior.

Moreover, the Plan trustees considered prior corporate sales in making their determination without acknowledging that those sales were structured differently than the Fuller sale. Mr. Herbert and the Committee based the benefits decision, in part, on their assertion that the Fuller transaction resembled the MTL, Richmond Terminal, and Gard transactions. See Finding of Fact 134. In fact, an examination of the prior transactions reveals that they were all unlike the Fuller sale.

In the MTL transaction, GATX spun off the shares of its wholly-owned subsidiary as a special dividend to GATX shareholders. There was no interruption in the plaintiff's employment for pension purposes. Additionally, Mr. Herman, the Plan

benefits to the Souders subclass, the plaintiffs who could not retire under the 55/15 option.

Administrator at the time of the transaction, testified at deposition that he thought Section 4.5 would not apply because "the spin-off of this subsidiary to shareholders would not constitute a triggering event under the provisions of the pension fund." See Exh.81. Clearly, that reasoning does not apply to the Fuller sale, which was not a spin-off of stock. The Richmond Terminal and GARB transactions differed from the Fuller sale in that the purchase agreements provided for the assumption of the assets and liabilities of the pension plan by the buyer.

Thus, in the prior instances where the Plan denied 75/80 benefits, the employees continued working for the new owner with their pension rights largely unaffected by the sale or spin-off. In spite of this fundamental difference between the earlier transactions and the Fuller sale, the Plan trustees relied

heavily on those prior transactions to justify their denial of benefits in this case.

The Plan fiduciaries also based the denial on the fact that the new Puller Company re-hired the plaintiffs, even though nothing in the Plan makes receipt of the enhanced benefit contingent on unemployment. The Plan clearly knew how to condition benefits on lack of employment. On March 14, 1986, GATX amended the severance pay plan to clarify that severance benefits were not available for employees who had the opportunity for continued comparable employment with subsidiaries that were sold by GATX as going concerns. See Finding of Fact 140.

Finally, the Plan trustees also claim to have considered the fact that the employees would be covered under a new Fuller pension plan. In fact, at the time the trustees made their decision, Fuller had not

yet adopted its new plan.[20] Additionally, Fuller had no contractual obligation to adopt any plan. Therefore, the trustees could not have considered the new plan, which did not exist at the time, in making their decision.

For these reasons, I reject the defendant's contention that GATX had no interest in the Committee's disposition of the plaintiffs' pension claims. This court finds that, under the special circumstances of this case, the GATX employees who served on the Committee had a conflict of interest. Therefore, the standard of review used must "integrat[e] factors such as self-interest into the legal standard for reviewing benefits determinations." Brown, 898 F.2d at 1561.

[20]The Plan Benefits Committee affirmed the denial of 75/80 benefits on June 8, 1987. The new Fuller Company adopted its Retirement Plan, retroactive to January 1, 1987, on July 30, 1987.

4. The Integrated Firestone Standard

Firestone changed the legal landscape for ERISA decisions. This court, in attempting to implement the proper standard of review, will look to post-Firestone decisions in other circuits, as well as pre-Firestone concepts of review consistent with the Firestone standard.

The Eleventh Circuit Court of Appeals has announced a standard for reviewing an ERISA fiduciary's benefit determinations that takes self-interest into account. The court wrote that "a wrong but apparently reasonable interpretation is arbitrary and capricious if it advances the conflicting interest of the fiduciary at the expense of the affected . . . beneficiaries unless the fiduciary justifies the interpretation on the ground of its benefit to the class of all participants and beneficiaries." Brown, 898 F.2d at 1561-62 (cited in Newell, 904 F.2d at

651);[21] see also Poole v. Seattle-First Nat'l Bank, 741 F. Supp. 837, 844-46 (E.D. Wash. 1990) (adopting the same approach).

Using the Brown approach, if the reviewing court has determined that a conflict of interest exists, it must then ascertain the correct interpretation of the plan at issue.[22] Pre-Firestone courts

[21]In adopting this standard, the Court of Appeals simply extended a federal common law rule developed under the LMRA. Brown, 898 F.2d at 1562 (citing cases). Although the theoretical underpinnings for discretionary review differ under the LMRA and ERISA, the two statutes impose similar duties of loyalty. Compare 29 U.S.C. § 1104(a) with 29 U.S.C. § 186(c)(5). Therefore, LMRA decisions can inform the development of ERISA jurisprudence.

[22]Other Courts of Appeals have held that post-Firestone deferential review for abuse of discretion requires the court to assess initially whether the plan fiduciary made an error in interpretation. See Pratt v. Petroleum Prod. Management Employees' Savings Plan, 920 F.2d 651, 659-61 (10th Cir. 1990) (employing deferential standard, court assessed whether trustee interpretation of plan was correct); Jordan v. Cameron Iron Works, Inc., 900 F.2d 53, 56 (5th Cir. 1990) (court must determine legally correct interpretation, and if the administrator's decision is not legally correct, court must

employing the arbitrary and capricious standard, but considering administrative bias, undertook a similar inquiry:

> When the members of the tribunal - for example, the trustees of a pension plan - have a serious conflict of interest, the proper deference to give their decisions may be slight, even zero; the decision if wrong may be unreasonable. The less likely it is that the trustees' judgment was impaired by their having a stake, however indirect, in the outcome, the less inclined a reviewing court will be to override their judgment unless strongly convinced they erred.

Van Boxel, 836 F.2d at 1052.

Having made the initial determination that a conflict of interest existed, this court will use the Brown approach to ascertain whether there was an

ascertain whether there was an abuse of discretion); cf. Ziaee v. Vest, 916 F.2d 1204, 1208 (7th Cir. 1990) (plan's decision must stand unless erroneous).

abuse of discretion. The Brown test is consistent with the purposes of ERISA and the Supreme Court's holding in Firestone. Using this approach, the next question posed is whether the Plan's interpretation of Section 4.5 was incorrect.

(i) Layoff or Mere Termination?

It is undisputed that the plaintiffs suffered a termination of employment. The stock purchase agreement provided that "the Closing Date hereunder is a Termination of Employment under the terms of the GATX Salaried Pension Plan for all Fuller participants." Exh. 13 § 5.10(b), at 25. The parties disagree only with regard to the nature of that termination.

The plaintiffs contend that their termination amounted to a layoff. They left work on December 31, 1986 jobless. They remained unemployed, albeit for a short period

of time, until called back on the first working day of 1987.[23]

The defendant argues that, although terminated, the plaintiff employees were not laid off because they never missed a day of work. According to the defendant Plan, this situation cannot constitute a layoff:

> Neither plaintiffs nor the other class members were, themselves, deprived of a job. Plaintiffs are left to argue that they were concerned and uncertain about whether they would be able to keep their jobs, and that GATX Corporation had no assurance from F A Holding Corporation that all Fuller Company employees would keep their jobs.

[23]Members of the Ruggeri subclass received telephone calls on the first working day of 1987 calling them back to work. Technically, members of the Souders subclass were not "called back" to work. They were told to report to their job sites, although they did not know whether the new Fuller Company would employ them. Thus, although they reported to their job sites, members of the Souders subclass were not employed prior to the first working day of 1987.

> Such concerns, however, do not constitute a layoff.

D. Tr. Mem. at 3.

Although concern about future employment does not constitute a layoff, temporary suspension of employment at the will of an employer certainly does. In CBS Inc. v. International Photographers of the Motion Picture Industries, Local 644, 603 F.2d 1061 (2d Cir. 1979), the court, in explaining the distinction between layoff and discharge, defined the term layoff as used in labor relations.

> The ordinary meanings of the terms discharge and layoff have long been recognized by the courts. A discharge normally means the "termination of the employment relationship or loss of a position." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 268 (1946). A layoff, on the other hand, is ordinarily a "period of temporary dismissal;" inherent in the tea is the anticipation of recall.

> Id. at 287 n. 11 & 286-87; accord, Lord Mfg. Co. v. Nemenz, 65 F. Supp. 711, 723 (W.D. Pa. 1946); see Acme Indus. Co., 227 N.L.R.B. 249 (1976).

603 F.2d at 1063 (emphasis supplied); see also Barnhart v. Compugraphic, No. 88-8441, 1989 U.S. Dist. Lexis 13521, *4 (E.D. Pa. Nov. 2, 1989), aff'd mem., 908 F.2d 961 (3d Cir. 1990); Rizzo v. Means Services. Inc., 632 F. Supp. 1115, 1131 (N.D. Ill. 1986) (term layoff implies a separation not as final as discharge); International Alliance of Theatrical Stage Employees v. Gulf Int'l Cinema Corp., 568 F. Supp. 1396, 1399 (E.D. La. 1983) (layoff is no more than suspension of work of an individual employee).

The fact that the plaintiffs knew they might be recalled to their jobs by the new Fuller Company only supports the conclusion that a layoff occurred when their employment was temporarily suspended. Because a temporary suspension with the possibility of

recall is the quintessential layoff, the suspension of the plaintiffs' employment on December 31, 1986 constituted a layoff.

The defendant's reliance on cases upholding the denial of severance pay when a corporation is sold is unavailing for two reasons. First, our Court of Appeals has recognized that employees in that situation may be eligible to receive severance pay. Ulmer v. Harsco Corp., 884 F.2d 98, 104 (3d Cir. 1989) (Higginbotham, J.). Second, severance pay serves a different purpose than pension benefits. Severance policies are designed to provide temporary salary continuation following a loss of employment. See. e.g., Becker v. Simpson Bldg. Supply Co., 675 F. Supp. 271, 278 (M.D. Pa. 1987); Pabst Brewing Co. v. Anger, 610 F. Supp. 214, 216 (D.Minn. 1985), aff'd, 784 F.2d 338 (8th Cir. 1986). Pension benefits are a contractually defined form of deferred compensation awarded

regardless of the pensioner's employment status. ERISA is designed to protect those contractually defined benefits. See H.R. Rep. No. 533, 93d Cong., 2d Sess. 1, reprinted in II Legislative History of the Employee Retirement Income Security Act 2348, 2348 (purpose of ERISA is protection of individual pension rights); Firestone, 489 U.S. at 113 (citing Shaw v. Delta Airlines. Inc., 463 U.S. 85, 90 (1983) and Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985)) (ERISA enacted to promote employees' interests and protect contractually defined benefits); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911, 914 (2d Cir.), cert. denied, 459 U.S. 1039 (2982) (purpose of ERISA to secure guaranteed pension payments); cf. Nachman Corp. v. Pension Ben. Guar. Corp., 446 U.S. 359, 375 (1980) (purpose of termination insurance to ensure that workers who have fulfilled conditions for vesting receive

defined benefits as promised). Consequently, to the extent severance pay cases are relevant at all, the law in this Circuit does not support the defendant's argument.

b. The Advancement of Whose Interest?

The maintenance of the Fuller portion of the Plan clearly represented a significant cost to both GATX and F A Holding. F A Holding did not want to assume the liabilities of the Fuller portion of the Plan; GATX did not want to retain full liability. Indeed, the costs of employee benefits often play a significant role in negotiations of corporate sales. As one commentator has noted,

> there are costs of employee benefits that cannot be avoided. They have to be retained by the seller or assumed by the buyer. Obviously, they seriously affect the price of the business. In fact, in mergers and acquisitions, the cost of

> employee benefits often becomes a critical point. The seller demands more to cover costs it has discovered in its due diligence, and the buyer offers less if it sees potential liabilities . . . . To the extent that some of these costs are never discovered, somebody is going to get hurt.

Welch, Employee Benefits Issues, 10 Indus. Rel. L.J. 84, 84-85 (1988).

The costs of employee benefits associated with the Fuller sale were not assumed by the buyer nor fully retained by the seller. F A Holding would have offered less if it had to assume the Plan's liabilities; GATX would have profited less if it had to retain full liability. By terminating the employees from the Plan, and then refusing to characterize the temporary employment termination as a layoff, GATX eliminated expenses both the buyer and seller wanted to avoid. Fortunately, under the strictures of ERISA, costs cannot be eliminated (at the

expense of the pensioners) in the bargaining process between the buyer and seller involved in a corporate sale.

As a result of the structure of the Fuller sale, the plaintiffs will lose money. The plaintiffs retain their vested rights to their accrued GATX pension as of the date of the sale.[24] The plaintiffs began to accrue their new Fuller pension after being re-hired by Fuller, although those benefits do not vest until after five years of service with the new Fuller Company. However, the plaintiffs' combined GATX and new Fuller pensions will amount to less than their GATX pension would have been if the sale had not occurred.[25]

[24]This is the portion of GATX pension liability retained by the Plan.

[25]This is particularly true for members of the Ruggeri subclass, who were coerced into accepting actuarially reduced benefits. Plaintiffs like Mr. Kotrosits suffered the most extensive loss, because they were mere months from eligibility for 90 point pensions, an unreduced benefit available to any employee whose years of service and age add up to

Significantly, if the Committee had granted the applications for 75/80 pensions, the enhanced costs would have become the responsibility of GATX. The fact that GATX executives thought that F A Holding planned to operate Fuller as a going concern does not eliminate the conflict of interest because the structure of the sale still shifted the benefits costs associated with the sale to the plaintiff employees.

The structure of the sale, the termination of the plaintiff employees, and the subsequent denial of subsidized early retirement benefits shifted benefits costs associated with the Fuller sale from GATX to the employees. Thus, the denial of 75/80

ninety. The termination of the plaintiffs from the GATX Plan and the Plan's discontinuance eliminated this significant liability for F A Holding and GATX. Although the plaintiffs had no vested right to the 90 point pension, this example illustrates how the termination of the plaintiffs' participation in the Plan imposed costs on the employees.

pensions incident to the Fuller sale clearly benefitted GATX, the employer of the trustees. The Plan's wrong but arguably reasonable construction of the term "layoff" advanced the interests of GATX at the expense of the plaintiffs. The Plan cannot justify that determination on the basis of its benefit to the class of all participants and beneficiaries.[26] Therefore, this court holds that the trustees abused their discretion in denying 75/80 pension benefits to the plaintiff employees.

In sum, this court concludes that parties to a corporate sale off stock or assets must fully safeguard the pension rights of the corporate employees in the selling documentation. If, as in this case, the structure of the sale results in a portion of

[26]Under the circumstances of this case, this court does not credit the Plan Administrator's self-serving statement that he based his decision solely on the interests of the other participants in the Plan.

the transaction costs being shifted to the employees of the entity being sold, courts should scrutinize the corporate sale closely. Because ERISA imposes obligations on plan fiduciaries and sponsors that cannot be evaded by subterfuge, federal courts will not countenance tactics such as those employed by GATX in conjunction with the Fuller sale. Therefore, this court will order the Plan to award 75/80 point pensions to the Fuller salaried employees who met the age and years of service requirements as of December 31, 1986. The Plan must adjust the pensions currently paid to the Ruggeri subclass members and must allow the Souders subclass members to retire retroactive to December 31, 1986. The Souders subclass members must receive the lifetime medical and life insurance benefits guaranteed to any Fuller employee who retired prior to December 31, 1986. Finally, the Plan must make the plaintiffs whole by reimbursing

them for pension monies owed to them since December 31, 1986 but not paid.

Based on the foregoing findings of fact and discussion, I reach the following conclusions of law.

CONCLUSIONS OF LAW

(a) The court has subject matter jurisdiction of this controversy pursuant to Section 502 of ERISA, 29 U.S.C. § 1132(e) (1)

(b) This court has in personam jurisdiction over the parties to this action.

(c) Venue is proper in this district pursuant to Section 502 of ERISA, 29 U.S.C. § 1132(e)(2).

(d) The plaintiffs have established that the Plan trustee's denial of 75/80 benefits amounted to an abuse of their discretion.

(e) Judgment will be entered in favor of the plaintiffs and against the defendant.

BY THE COURT:

_____

Edward N. Cahn, J.

STATUTES

29 U.S.C. Section 1104(a)(1) provides in pertinent part as follows:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest in the participants and beneficiaries and -
>
> (a) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan.

Supreme Court, U.S.
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No. 92-648

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

EDWIN KOTROSITS, *et al.*,
Petitioners,

v.

GATX CORPORATION NON-CONTRIBUTORY PENSION PLAN FOR SALARIED EMPLOYEES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

The petition touches on a number of issues, but appears to raise the following principal question:

> Whether the court of appeals properly analyzed the trial record and relevant legal principles in concluding that the respondent Plan did not act under a conflict of interest in denying petitioners' claims for enhanced pension benefits?

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R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 13

Respondent GATX Corporation Non-Contributory Pension Plan for Salaried Employees (the "Plan") respectfully submits this brief in opposition to the petition for a writ of certiorari in this case.

OPINIONS BELOW

The unanimous opinion of the court of appeals (Pet. App. 3-50) is reported at 970 F.2d 1165 (3d Cir. 1992). The district court's opinion and order (Pet. App. 51-172) are reported at 757 F. Supp. 1434 (E.D. Pa. 1991).[1]

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1992. Petitioners filed their petition for certiorari on October 2, 1992, and it was rejected. Petitioners thereafter refiled their petition on October 13, 1992, and it was accepted. Petitioners have erroneously relied upon 28 U.S.C. § 2101 (setting forth procedural requirements for filing petitions for certiorari) and S. Ct. R. 17 (setting forth procedural requirements for original actions). *See* Pet. 10. Petitioners have not cited 28 U.S.C. § 1254(1), the only possible jurisdictional basis for their petition.

STATEMENT OF THE CASE

Petitioners have omitted or obscured many of the key facts in this case. Mindful of its obligations under S. Ct.

---

[1] Due to numerous typographical errors in petitioners' appendix, respondent has cited to the reported versions of these opinions.

R. 15.1, the Plan believes that the facts set forth below help establish why the decision below is unexceptional and does not furnish a basis for certiorari.

Petitioners are Fuller Company employees who claim that they are entitled to enhanced early retirement benefits under the terms of the Plan. On December 31, 1986, GATX Corporation ("GATX") sold the stock of this former second-tier subsidiary to Fuller Company management in a leveraged buyout. Petitioners did not miss any work as a result of the buyout; each returned to the same job on the first business day of the new year. Despite continuing in their jobs after the buyout, petitioners claim that they suffered a "layoff" under GATX's pension plan entitling them to enhanced benefits.

1. The Terms and Financial Condition of the Plan When Petitioners' Claims Arose. Prior to the buyout, pension benefits accrued to petitioners as participants in the Plan, which covered salaried employees of GATX and of various subsidiaries including Fuller Company. (S. 64.)[2] The Plan is a non-contributory, defined benefit plan. (S. 35, SS. 15.) Thus, the employer (for example, Fuller Company) rather than the participant, makes the contribution to the Plan. (SS. 15.)

At the time of the buyout and of the Plan's consideration of petitioners' claims, the Plan was significantly overfunded. It had a surplus of $8.79 million as of January

[2] This case was submitted in the district court on a stipulated record. The record includes the parties' Stipulation of Facts ("S."), Supplemental Stipulation of Facts ("SS."), 89 jointly submitted exhibits, the transcript of the district court's December 16, 1988 hearing on the merits (Joint Appendix ("J.A.") 86-153), and attachments to the parties' supplemental memoranda of law (J.A. 154-261).

1, 1986, the last audit date preceding the sale. 970 F.2d at 1173. By January 1, 1987, the last audit date preceding consideration of the representative plaintiffs' claims, the surplus had grown to $10.2 million. *Id.*

As of December 31, 1986, the Plan document (J.A. 352 *et seq.*) provided for several different types of early retirement for eligible participants. Petitioners Julius Ruggeri and Edwin Kotrosits, because they had 15 years of Fuller Company service credit, were eligible to retire at age 55. (§ 4.4.) Those choosing the "55-15" retirement option receive benefits reduced so as to be the "actuarial equivalent" of benefits they would later have received had they commenced retirement at age 62. (§ 5.3.)

This case turns on another form of early retirement with different eligibility criteria, the Plan's 75/80 point provision. Section 4.5(a) of the Plan permits participants with sufficient age and service credit to apply for enhanced early retirement benefits if they (a) have a "Termination of Employment" (*see* § 2.14) and (b) meet the additional criteria specified by the Plan. In relevant part, Section 4.5 provides early retirement benefits to any employee:

> with at least 15 years of Service Credit who has not attained age 62, who either (i) has attained age 55 and whose age and Service Credit total at least 75, or (ii) whose age and Service Credit total at least 80, and
>
> (a) who has a Termination of Employment due to permanent shutdown of a plant, department or subdivision thereof, or due to layoff or disability.

If a participant qualifies for a 75/80 point pension, his benefits are not actuarially reduced even though he has retired before age 62. (§ 5.2.)

Petitioners nowhere quote Section 4.5(a), but its text is important. Section 4.5(a) requires *more* than simply a termination of employment (*compare* Pet. 31); the participant must meet one of three additional eligibility criteria. These criteria—permanent plant shutdown, layoff, and disability—share a common feature: the participant has actually lost his job. Enhanced benefits ease the blow of lost wages in these instances.

*2. **The Fuller Company Leveraged Buyout.*** On December 31, 1986, GATX sold all of the stock of its second-tier Fuller Company subsidiary to FA Holding Corporation ("FA") through a Stock Purchase Agreement. (S. 68; J.A. 467.) The officers of FA (primarily the top executives of Fuller Company) represented that they would operate Fuller Company as an ongoing concern. (S. 72, 107; SS. 14 & J.A. 747.) At no time did FA advise anyone at GATX that FA contemplated making reductions in force at Fuller Company following the sale. (S. 77; SS. 10.)

The buyout of Fuller Company had no effect on that company's day-to-day operations. While the ownership of its stock changed, the company's facilities remained open for business and continued making and selling the same products that had been made and sold before the sale. (S. 79; SS. 8.)

*3. **Petitioners' Retention of their Jobs Following the Sale.*** The most important fact obscured by the petition is that neither petitioners nor the sub-classes they represent missed a single day of work or a dollar of salary as a result of the Fuller Company sale. Although the Stock Purchase Agreement declared that the sale constituted a "Termination of Employment" under the Plan, that ter-

mination was purely technical.[3] Petitioners remained in the same jobs employed by the same employer, Fuller Company.

Petitioners Julius Ruggeri and Edwin Kotrosits represent a sub-class of Fuller Company employees with sufficient age and seniority to have filed for a "55-15" pension commencing after the date of the Fuller Company sale, December 31, 1986. (S. 13, 23.) By so filing, petitioners locked in certain lifetime medical and life insurance benefits offered, not by the Plan, but by GATX's subsidiary General American Transportation Company ("GATC"). (J.A. 335, 345.)

Prior to 7:00 a.m. on January 2, 1987, both petitioners received a telephone call from Fuller Company "inviting [them] to return to work." (S. 14, 24.) They then returned to the same job, at the same plant and under the same supervisor, that each had left on the previous business day. (S. 14-16, 25-26.) Thus, neither their jobs nor their salaries were interrupted.

Petitioner Marvyn Souders represents a sub-class of Fuller Company employees who lacked sufficient age and service to file for "55-15" early retirement as of December 31, 1986. Prior to the Fuller Company sale, Mr. Souders was told "to report to work on January 5, 1987, and he would be notified at that time regarding his job status." (S. 34.) On January 5th, the first business day after the sale at the Bethlehem Plant, Mr. Souders reported to the same job that he had held prior to the buyout with the

[3] By declaring a "Termination of Employment" (a defined term under the Plan (§ 2.14)), GATX acknowledged that members of the Ruggeri subclass (who applied for 55-15 pensions) could begin receiving benefits immediately after the sale.

same employer (Fuller Company) under the same supervisor.[4] (S. 32.)

4. The Plan's Consideration of Petitioners' Claims. Despite remaining in their jobs, petitioners Souders, Kotrosits, and Ruggeri filed claims for 75/80 point "layoff" benefits in March, 1987. (S. 105 & J.A. 697.) The claims were devoid of detail. (*See id.*) Petitioners simply asserted that, by virtue of the Fuller Company sale, they had met the requirements of Section 4.5(a). (J.A. 540.) Messrs. Ruggeri and Kotrosits also claimed that they were involuntarily terminated (and therefore "laid off") because they could not obtain the GATC insurance benefits if they did not retire by December 31, 1986. (*Id.*)

Petitioners' claims were so lacking in detail or supporting evidence that they failed to acknowledge that they were continuing to work at Fuller Company. Nor did they claim that they had a "temporary suspension of employment," as they now assert. Pet. 31. Petitioners also made no mention of Fuller Company's new pension plan, and thus did not suggest that the new plan was in any way relevant to deciding whether they qualified for 75/80 point benefits under *GATX*'s plan.

Petitioners' claims were received by the Plan Administrator, James Herbert, who denied them in letters dated March 30, 1987. (S. 106 & J.A. 543.) Mr. Herbert's decision was based on his understanding that FA had intended to operate, and was operating, Fuller Company as a continuing concern, and that Messrs. Souders, Rug-

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[4] Petitioners' claim that he was told on January 5th to report on January 6th has no support in the record and is contrary both to Mr. Souders' sworn testimony and the finding of the District Court. 757 F. Supp. at 1444.

geri, and Kotrosits continued to work at Fuller Company. (S. 107.) His understanding came both from Kenneth Krick, GATX Corporation's primary negotiator with FA (S. 84, 89), and from Elmer Gates, Chairman of FA, who told a November 1986 meeting of Fuller employees, "We are going to hit the ground running. We look to continue the operation." (S. 107; *see* SS. 38.)

Mr. Herbert's decision also was based on the Plan's treatment of prior dispositions of businesses covered by the Plan. (S. 108.) The Plan had not previously afforded 75/80 point benefits to employees of businesses sold as going concerns whose employment was uninterrupted by the sale. 970 F.2d at 1174.

On April 30, 1987, petitioners appealed the Plan Administrator's denial of their claims to the Plan Benefits Committee. (S. 111 & J.A. 549.) Prior to the Committee meeting on June 8, 1987, the Committee received extensive materials and a chronology of events prepared by Mr. Herbert. (S. 114 & J.A. 556.) At the June 8th meeting, the Committee voted to uphold the Plan Administrator's decision. (S. 112.) The basis for the Committee's decision, as set forth in written minutes (J.A. 556), included the fact that petitioners continued in their Fuller Company jobs after the buyout and that the Plan's treatment of prior business sales. (S. 113.)

5. Proceedings in the District Court. Plaintiffs filed their Complaint on March 2, 1988. On June 1, 1988, the Court conditionally certified the Souders and Ruggeri subclasses. Following submission of the case on a stipulated record, the court held oral argument on December 16, 1988. At argument, the court's questions focused on whether plaintiffs would be "hurt" by a diminution in future pension benefits resulting from the sale, and referred to the

parties' dispute over the definition of layoff as a mere "word game." The court also was clear that, in its view, the dispositive point should be whether a reduction in post-buyout benefits would, in fact, occur.

> THE COURT: It's a word [i.e. the terms used in § 4.5(a)], again, it's a word. The point I'm making is if your people were hurt I'd play the word game your way. If they're not hurt, why should I? It's just as easy for a judge to say in this fact situation we find that there is no plant closing under the context of this case and the phraseology, therefore no recovery. But if I find your people are hurt, I could easily say yes, it was a plant closing. It's no longer a GATX plant, therefore it has to be a termination or a plant closing, therefore you win. . . . I'm here to exercise my conscience as to what's right.

(J.A. 111.)

> THE COURT: Well, if your people [i.e. plaintiffs] are hurt I'm going to rule in their favor, that's for sure. What you want me to do is rule in their favor even if they're not hurt, and that's harder for me to do.

(J.A. 121.) The court then ordered the parties to submit post-argument briefs on the issue of whether petitioners had been "hurt."

In addition to discussing the impact of this Court's intervening decision in *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the parties submitted briefs and accompanying actuarial calculations on the effect the Fuller Company sale had on the economic position of the petitioners. Using an analysis prepared by the Plan's regular consulting actuary, the Plan submitted evidence demonstrating that petitioners' *total* economic expectations had changed minimally as a result of the sale. *See* 970 F.2d at 1174-75 (describing parties' submissions).

The Plan addressed a final economic issue: whether plaintiffs would enjoy a windfall if they received 75/80 point enhanced benefits while continuing to work and earn credit towards a second Fuller Company plan pension. The Plan submitted an analysis showing that, under that scenario, the Ruggeri and Souders sub-classes would, respectively, enjoy pensions **22%** and **60%** higher than if the Fuller Company sale had never occurred. (J.A. 207.)

6. The District Court's Decision. Eighteen months after completion of the supplemental briefing, the court issued an opinion ordering the Plan to pay both sub-classes 75-80 point benefits because the Plan's decision was incorrect. Although the court found that the Plan's decision was "arguably reasonable," 757 F. Supp. at 1461, and entitled to deference under the terms of the Plan, *id.* at 1453, it ruled that such deference should be strictly limited because, "under the special circumstances of this case," the Plan operated under a conflict of interest. *Id.* at 1458, 1461.

In finding a conflict of interest, the court did not discuss the Plan's $10,000,000 funding surplus or the caselaw (cited *infra*) suggesting that a substantial surplus negates a conflict of interest. It also found "bad faith" based on the conduct of GATX, the plan sponsor. The court also somehow found probative of a conflict of interest how the Plan interpreted prior business sales and its supposed reliance on the post-buyout Fuller Company pension plan.[5] *Id.* at 1461.

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[5] Even were there a logical relationship between such consideration and whether the Plan had a conflict of interest, the Plan never claimed to have considered the new Fuller Company plan since petitioners had not submitted that plan as part of their claims.

Having found a conflict of interest, the trial judge then rejected the Plan's decision that plaintiffs had not been laid off on the ground that they had suffered a "temporary suspension of employment." *Id.* at 1459. Finally, the court held that the Plan's decision could not be justified, given the conflict of interest, because GATX had sacrificed plaintiffs' interests in negotiating the Fuller Company sale by not securing a guarantee that plaintiffs' pension accruals would remain the same following the sale. *Id.* at 1461. The court's conclusion treats this omission as the crucial fact in the case:

> In sum, this court concludes that parties to a corporate sale of stock or assets must fully safeguard the pension rights of the corporate employees in the selling documentation. If, as in this case, the structure of the sale results in a portion of the transaction costs being shifted to the employees of the entity being sold, courts should scrutinize the corporate sale closely. Because ERISA imposes obligations on plan fiduciaries and sponsors that cannot be evaded by subterfuge, federal courts will not countenance tactics such as those employed by GATX in conjunction with the Fuller sale. Therefore, this court will order the Plan to award 75/80 point pensions.

Id. (emphasis added). The court ignored the decided caselaw on this point, which holds that selling companies have no obligations under ERISA to ensure that *future* benefit accruals are not diminished by the sale.[6]

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[6] *See Dougherty* v. *Chrysler Motors Corp.*, 840 F.2d 2, 3 (6th Cir. 1988); *Phillips* v. *Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987). *Accord Aubrey* v. *Pennzoil Co.*, 961 F.2d 928, 932 (10th Cir. 1992).

*7. **The Court of Appeals' Decision.*** On July 6, 1992, a unanimous panel of the Third Circuit reversed the district court and upheld the decision of the Plan Benefits Committee that petitioners were not entitled to enhanced benefits. The court rejected the district court's finding that the Plan acted under a conflict of interest and upheld the Plan's construction of "layoff" as reasonable under a deferential standard of review.

The Third Circuit's conclusion that the Plan did not act from a conflict of interest rested on a careful evaluation of the legal significance of the evidence tendered to the district court. The court of appeals observed that the Plan's assets "far exceeded the benefits accrued to date" and recognized the absence of a finding by the district court on the impact of this surplus. 970 F.2d at 1173. The court of appeals also noted both the lack of evidence to support findings of bad faith and that, in any event, the bad faith was irrelevant to the legal determination whether the Benefits Committee acted under a conflict of interest. *Id.* at 1174. The court of appeals concluded further that the Benefits Committee's "reasonable" analysis of prior business sales did not bear on the existence of a conflict of interest. *Id.* The court rejected as legally irrelevant the district court's concern that GATX had not guaranteed the pension levels provided by the new Fuller Company ownership. *Id.* at 1175.

The court of appeals also had no difficulty in holding the Benefits Committee's interpretation to be reasonable. In so holding, the court noted some of the numerous ERISA cases upholding plan decisions not to provide enhanced pensions or severance to employees who retain their jobs with a new owner following a sale of business. *Id.* at 1176-77 (citing cases).

REASONS FOR DENYING THE WRIT

Although their petition mentions several issues in passing, petitioners have not presented a single credible ground for certiorari.

They have not shown a conflict among the circuits. They do not assert that there is a direct conflict between the decision below and *Brown* v. *Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991). They instead claim that the decision below "effectively circumvent[s]" or "do[es] an end run on" *Brown*. Pet. 2, 41. The simple truth is that petitioners cite *Brown* for a different issue than the issue decided below. Petitioners cite *Brown* solely for its discussion of how to treat a conflict of interest *once a conflict is found*. The decision below instead addresses a different issue: *whether* a conflict existed at all where, as here, the Plan had a significant surplus.

Petitioners also suggest that the court of appeals failed to give proper deference to the "findings" of the district court—hardly a certworthy issue. Petitioners do not even identify, much less address, the court of appeals' unexceptional proposition that the district court's evaluation of the legal significance of the facts is itself "a legal question subject to plenary review." 970 F.2d at 1172 n.5. Nor do petitioners acknowledge the court of appeals' reliance on the decisions of four other circuits recognizing, as a matter of law, that fully-funded Plans do not operate under a conflict of interest.

Finally, petitioners seem to suggest that there is a conflict among the circuits in deciding whether employees who remain in their jobs following a business sale have suffered a layoff. Petitioners (like the district court) cite earlier labor law decisions involving entirely different facts

and ignore the consistent line of *ERISA* decisions holding that such business sales do not constitute layoffs absent explicit plan language to the contrary.

I. THE DECISION BELOW DOES NOT CONFLICT WITH THE ELEVENTH CIRCUIT'S DECISION IN *BROWN*.

Faced with a petitioner's claim that there is a conflict among the circuits, this Court has granted review only when confronted with "a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.3, at 196 (6th ed. 1986) (footnote omitted). There is no reason for review when the supposedly conflicting decisions do not decide the same issue.

Here, petitioners do not argue that there is a direct conflict of any kind between the decision below and *Brown* v. *Blue Cross & Blue Shield of Alabama, Inc.*, 898 F.2d 1556 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991). Nor could they. The decision below rests in pertinent part on the court's determination that respondent, a fully-funded plan, did not act under a conflict of interest in denying petitioners' claims. In *Brown*, the Eleventh Circuit held that the defendant insurer acted under a conflict of interest in paying benefits precisely because it was *not* a trust.

> Because an insurance company pays out to beneficiaries from its own assets rather than the assets of a trust, its fiduciary role lies in perpetual conflict with its profit-making role as a business. . . . The inherent conflict between the fiduciary role and the profit-making objective of an insurance company makes a highly deferential standard of review inappropriate.

898 F.2d at 1561-62.

The Eleventh Circuit therefore had no occasion to consider under what circumstances fiduciaries who are not insurers operate under a conflict of interest. The contrast could not be greater than between an insurer paying from its own assets and a fully-funded plan with a surplus in excess of $10 million. Here, GATX as Plan sponsor faced no direct liability at all.

Petitioners instead rely on *Brown* solely and explicitly for its analysis of the standard of review *assuming* that a conflict of interest exists. *E.g.*, Pet. 35, 43-45. The insurmountable difficulty for petitioners in seeking certiorari is that the Third Circuit never had to consider that analysis because the court held that the respondent Plan did not act under a conflict of interest. The Third Circuit simply did not reach the asserted basis for the conflict with *Brown*. *Brown* therefore has no bearing on this case.

Undaunted, petitioners complain that the Third Circuit sought to "circumvent[ ]" or "do an end run on [sic] *Brown*." Pet. 2, 41. Petitioners are thus reduced to seeking certiorari based on the Third Circuit's *failure* to create a conflict with *Brown* in ruling for respondent. As a basis for certiorari, this borders on the frivolous.

In reality, petitioners' "argument" has nothing to do with *Brown*, but instead rests on their explicit assertion that the Third Circuit had an ulterior motive in holding that the Plan had no conflict of interest. They contend that the Third Circuit (a) wanted petitioners to lose and (b) could cause petitioners to lose only by reversing the district court's decision on the conflict of interest issue.

> The issue before this Court . . . goes to the heart of a District Court's fact-finding responsibilities and an appellate court's ability to disregard those findings to change the outcome of a case to its own liking.

Pet. 27.

> The Third Circuit simply refused to recognize this obvious conflict [of interest]; perhaps that was the only way they could avoid directly test [sic] challenging *Brown*.

Pet. 36.

> It is submitted that the Third Circuit felt compelled to override the District Court's factual finding that there has [sic] conflict of interest because of its critical significance under [*Brown*].

Pet. 41. Petitioners thus ask this Court to sit as a court of error to correct the supposed injustice perpetrated below.

This Court is not a court of error, nor does a groundless attack on the integrity of the Third Circuit furnish a basis for certiorari. The unanimous panel's decision is careful, thorough, and (as discussed in the next section) consistent with the caselaw from other circuits. A petition premised on baseless charges of judicial bias is simply not credible.

II. PETITIONERS HAVE NOT RAISED A SUBSTANTIAL CHALLENGE TO THE THIRD CIRCUIT'S REVIEW OF THE DISTRICT COURT'S DECISION THAT THE PLAN ACTED UNDER A CONFLICT OF INTEREST.

At more or less random intervals, petitioners claim that the Third Circuit improperly failed to give deference to the district court's "findings" regarding the Plan's alleged conflict of interest.[7] Pet. 24, 27, 30, 47-48. Petitioners never frame this supposed issue as a reason to grant certiorari. They show no conflict among the circuits; indeed, four other circuits have also held that plans with substan-

[7] As discussed above, petitioners claim that the Third Circuit disregarded these "findings to change the outcome of [the] case to its own liking." Pet. 27.

tial surpluses do not labor under a conflict of interest. Nor have petitioners cited cases from other circuits showing that the court of appeals' review of district court findings in this area is somehow a matter of concern requiring this Court's attention.

Leaving aside their failure to frame the issue in terms of certiorari, petitioners have not shown that the standard of review is a bona fide issue in this case. Petitioners never quote or describe the Third Circuit's unexceptional analysis of its review of the district court's conflict of interest determination. We do so below.

> [W]hile the district court's factual determinations regarding the circumstances under which the [Benefits] Committee's decision was made are entitled to a presumption of correctness, the court's decision that these circumstances warrant a reduced level of deference is a legal question subject to plenary review. In order to determine the proper level of deference due the committee's decision, we must therefore undertake an independent evaluation of the significance of the alleged bias.

970 F.2d at 1172 n.5 (citation omitted).

The standard of review is, of course, a question of law. Moreover, the Third Circuit is surely correct in holding that the legal significance of the facts is subject to the court of appeals's plenary review of legal questions. As the Second Circuit has noted, even in making factual determinations:

> a decision-maker might rely on legally impermissible factors, fail to give consideration to legally relevant factors, apply incorrect legal standards, or misapply correct legal standards. . . . [The court of appeals should] accord plenary review to any aspect of a trial court's decision that can fairly be isolated as determining an issue of law.

ASCAP v. *Showtime/The Movie Channel, Inc.*, 912 F.2d 563, 569 (2d Cir. 1990) (Newman, J.). *Cf. FDIC* v. *Oaklawn Apartments*, 959 F.2d 170, 173 (10th Cir. 1992) (application of law to facts subject to plenary review).

Unsurprisingly, the grounds urged by petitioners for reversal of the court of appeals rest on a series of legal principles that have been rejected, directly or indirectly, by other circuits under ERISA. For example, petitioners allege a conflict of interest because the members of the Plan Benefits Committee are GATX officers. Pet. 36-37. The circuits have often rejected the contention that a plan has a presumptive conflict of interest merely because its fiduciaries are also employees of the sponsor (here, GATX).[8]

Petitioners also claim that the potential $2 million cost to the Plan of granting enhanced benefits created a conflict of interest. The court of appeals determined that the Plan had a $10.2 million surplus at the time of the sale and noted the uncontradicted evidence that the Plan could amortize the $2 million cost over 15 years. 970 F.2d at 1173 & n.6.[9] The court then relied on the opinions of four other circuits in holding that the surplus negated any present conflict of interest and created only a "possibility of future indirect consequences" to GATX as sponsor. *Id.* at 1173. *See Woolsey* v. *Marion Laboratories, Inc.*, 934 F.2d 1452, 1459-60 (10th Cir. 1991); *De Nobel* v. *Vitro Corp.*, 885 F.2d 1180, 1191 (4th Cir. 1989); *Lowry* v. *Bankers*

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[8] *See, e.g., Woolsey* v. *Marion Laboratories, Inc.*, 934 F.2d 1452, 1459 (10th Cir. 1991); *De Nobel* v. *Vitro Corp.*, 885 F.2d 1180, 1191 (4th Cir. 1989); *Lowry* v. *Bankers Life & Casualty Retirement Plan*, 871 F.2d 522, 525-26 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989).

[9] The district court made no finding (and, indeed, ignored) the extent of the Plan's surplus.

Life & Casualty Retirement Plan, 871 F.2d 522, 525-26 n.7 (5th Cir.), *cert. denied*, 493 U.S. 852 (1989); *Oster* v. *Barco of California Employees' Retirement Plan*, 869 F.2d 1215, 1217 (9th Cir. 1988).

Petitioners again presume, without citation to authority beyond the district court's decision, that respondent had a conflict of interest because it had no reason to be concerned about the morale of Plan participants who, after the buyout, no longer worked for a GATX-owned business. There is no presumption that Plan fiduciaries are biased, *De Nobel* v. *Vitro Corp.*, 885 F.2d at 1191, and no circuit has ever adopted the legal principle necessarily urged by petitioners: that a fiduciary must establish that he had an incentive to be fair.[10]

Finally, petitioners criticize the Third Circuit for ignoring the cost to GATX (actually GATX's subsidiary GATC) of granting medical and life insurance benefits to members of the Souders sub-class (*i.e.*, those petitioners who were not eligible for early retirement to lock in these benefits). Petitioners fail to disclose that the district court never ruled on this issue, which was raised after the district court made its decision.[11] Yet, assuming *arguendo* that this issue could properly be considered by the court of appeals, the Third Circuit's alternative conclusion that the "record is devoid of any evidence . . . regarding this pro-

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[10] In fact, ERISA's penalties for breach of fiduciary duty (29 U.S.C. § 1109) are reason enough for fiduciaries to adhere strictly to their duties—especially where, as here, the plan has a substantial surplus.

[11] Petitioners also do not disclose their failure to put the insurance plans in evidence in the district court.

gram or the costs associated with it," 970 F.2d at 1175, hardly raises a question for certiorari.[12]

III. THE PLAN'S CONSTRUCTION OF "LAYOFF" IS FULLY CONSISTENT WITH THE *ERISA* CASELAW CONSTRUING THIS TERM.

Petitioners claim almost in passing that the Plan's construction of "layoff", upheld by the Third Circuit as reasonable, is inconsistent with the decisions of other courts. With a dismaying lack of candor, petitioners have cited two irrelevant labor law cases,[13] without discussing *any* of the ERISA cases holding that employees who retain their jobs after the sale of a business have not suffered a layoff.

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[12] Petitioners also claim that the decision below has "implications concerning the application of the arbitrary and capricious standard" even absent a conflict of interest. *See* Pet. 48. "Implications" are insufficient to justify certiorari—and petitioners have certainly not shown a conflict among the circuits or confusion of any kind. While the circuits have properly looked at the circumstances of each case to determine if the defendant abused its discretion, they agree that the principal factors urged by petitioners, the plausibility of the plan's construction of its terms, prior administration of the plan, and evidence of bad faith, are relevant. *See, e.g., Arfsten* v. *Frontier Airlines Retirement Plan*, 967 F.2d 438, 441-42 (10th Cir. 1992); *Guy* v. *Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989); *De Nobel* v. *Vitro Corp.*, 885 F.2d at 1187. In reality, petitioners simply disagree with the Third Circuit's evaluation of these factors, but their disagreement hardly shows a need for certiorari.

[13] *See* Pet. 32-33 & n.3 (citing *CBS Inc.* v. *International Photographers of Motion Picture Industries, Local 644*, 603 F.2d 1061, 1062 (2d Cir. 1979) (reviewing arbitrator's decision whether there had been a "layoff" or a "discharge"); *Barnhart* v. *Compugraphic*, No. 88-8441, 1989 U.S. Dist. LEXIS 13521, at *5 (E.D. Pa. Nov. 1, 1989), *aff'd*, 908 F.2d 961 (3d Cir. 1990) (deciding whether there had been a "layoff" or "termination").

The ERISA cases are numerous and consistent, whether construing a "layoff" provision of a pension plan or a severance pay plan.[14] In case after case, the courts have endorsed the common sense construction that a plan participant has not been laid off unless he suffers a period of real unemployment in which he is not receiving an income. *See, e.g., Rowe* v. *Allied Chemical Hourly Employees' Pension Plan*, 915 F.2d 266 (6th Cir. 1990) (pension plan; de novo review); *Pabst Brewing Co.* v. *Anger*, 784 F.2d 338 (8th Cir. 1986) (severance plan); *Jung* v. *FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985) (severance plan); *Garavuso* v. *Shoe Corp. of America*, 709 F. Supp. 1423, 1428 (S.D. Ohio) (severance plan), *aff'd*, 892 F.2d 79 (6th Cir. 1989); *Amore* v. *General Elec. Co.*, No. 85-4575-Z (D. Mass. Nov. 14, 1986) ("layoff benefit" plan); *Esler* v. *Northrop Corp.*, No. 20537-B (W.D. Mo. Aug. 4, 1981) (pension and severance plan). Petitioners, of course, have cited no ERISA cases to the contrary.

Under the circumstances, petitioners have no basis for suggesting that there is a conflict among the circuits. Moreover, petitioners do not have a respectable argument to make on the merits regarding the language of the Plan in this case. Under *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989), the courts must determine "the intention of the settlor" in construing the terms of a plan.

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[14] Pension and severance cases are equally relevant because the purpose of providing or enhancing benefits in the event of a real layoff (i.e. actual loss of work) is the same: "to aid employees through a period of unemployment due to layoff, *during which the employee is without income.*" *Garavuso* v. *Shoe Corp. of America*, 709 F. Supp. 1423, 1428 (S.D. Ohio) (emphasis added), *aff'd*, 892 F.2d 79 (6th Cir. 1989). *See, e.g., Jung* v. *FMC Corp.*, 755 F.2d 708, 713 (9th Cir. 1985).

Id. at 112 (quoting Restatement (Second) of Trusts § 4 comment *d* (1959)). Throughout this litigation, petitioners have never offered any evidence that GATX, as Plan sponsor, intended to deplete Plan assets by enhancing benefit payments for employees who had suffered no interruption of income.

The terms of the relevant provision explain petitioners' failure. Section 4.5 of the Plan grants enhanced benefits only to those participants who suffer "a Termination of Employment due to permanent shutdown of a plant, department or subdivision thereof, or due to layoff or disability." Participants who suffer a termination of employment "due to" a plant shutdown, layoff or disability share three features: they no longer occupy their jobs; they have lost their full salary; and they are in need of a supplement for lost income. Under ordinary canons of construction, "doubt as to the meaning of a specific term in an enumeration should be resolved by reference to the other specific terms in the group or class." *Royal Ins. Co. (U.K.) Ltd.* v. *Ideal Mutual Ins. Co.*, 649 F. Supp. 130, 135 (E.D. Pa.), *aff'd mem.*, 806 F.2d 254 (3d Cir. 1986).

Petitioners have thus failed to account for the consistent ERISA caselaw supporting the Plan's decision or to explain how their desired construction of "layoff" can credibly be said to express the intent of GATX as settlor. They have again failed to offer a credible reason for certiorari, let alone reversal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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